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Supreme Court, U.S.
FILED

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No.

In the
**Supreme Court of the United States**

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RONALD JARMUTH
AND
ANGELA FRINZI

*Petitioners*

v.

BRIAN KROLCZYK,
VALLEY COMPREHENSIVE COMMUNITY MENTAL HEALTH CENTER, INC,
MONONGALIA COUNTY, WV BOARD OF EDUCATION,
AND
HARRISON COUNTY, WV, BOARD OF EDUCATION

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*On Petition For Writ Of Certiorari*
*To The Supreme Court of Appeals of West Virginia*

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**PETITION FOR WRIT OF CERTIORARI**

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## Questions Presented For Review

**Introductory Statement**

In a case referred by a state circuit judge to a family law master who was asked to modify a parenting plan. That matter involved two long divorced parents of a child where the primary custodian (Angela Frinzi) relocated to a nearby county within the same state (WV). The master ordered (Appdx. 14, all orders identical except for adult's name) the parents and their significant others, but not the child to submit to a clinical (psychological) evaluation from a specified mental health facility. He entered the orders without notice or hearing. The master lacked the authority (WVC 48A-4-9 -13, -15, -20 Appdx 31-32) to enter any non-procedural, non-consensual order. The statute cited in the orders, WVC 48-11-301 (Appdx. 30) which required an order signed by a state Circuit Judge), provided authority only for an evaluation of the child -- to identify the special needs, if any, of the child so as to reflect them in a parenting plan and to prepare a report concerning only the child. The "compulsory" adult patients were required to pay for the evaluations themselves and did so. Prior to submitting to any services the adults asserted that they were not undergoing evaluations because of the (defective) order but as clients with all related rights. The mental health facility required them to sign statements (Appdx. 58) of client rights - required by 45 CFR 164 (Appdx 23, Privacy of Records) which were co-signed by a representative of the facility guaranteeing the "privacy of records" and the "exercise of civil rights". An administrative employee of the mental health facility with no professional responsibilities pretended to be a psychologist and conducted the clinical evaluations of the adults. In the course of this session he asked and obtained information about very private details of the patients' lives. Those details would never have been disclosed if the patients had any hint that the evaluator was

neither licensed nor even supervised. The mental health facility provided at least one petitioner a letter (Appdx. p 34) stating that the employee who performed the clinical evaluations was a psychologist.

The master's orders (Appdx. 14) for evaluation did not require that the facility provide a report of the clinical evaluations to the court. The orders required that, per the statute, the facility conduct an investigation of the child's needs and that was to be the subject of the report. The orders directed that the facility provide the court and others copies of a report.

The mental health facility did not make any attempt to verify the master's authority to enter the order or his authority to order clinical evaluations of persons other than the child.

Without prior or later notice to the clients and ignoring the signed agreement of client rights, the administrative employee disclosed (Appdx. 35, all "reports" similar) all the contents of the mental health files to the Court and to specified non-court persons. The administrative employee did so by providing his clinical evaluations of the adults instead of furnishing a report of an investigator as to the child. He also discussed his clinical evaluations of the adults with the Guardian Ad Litem for the child - who herself had no release and no authority under law to obtain such disclosures regarding the adults unlawfully examined.

The administrative employee was never identified pre-trial as an expert witness (and thus never questioned by counsel for parties). Lacking the actual qualifications by training or experience to address child custody, the administrative employee was presented the day of trial as an expert witness by the Guardian Ad Litem. He lied under oath about both his licensure status (Appdx. 41, 42) and his experience (Appdx. 46, 42), in order to take the stand. The mental health records of the mental health facility "clients" were protected by federal and state statute and rule. At the hearing on the parenting plan the master never ordered the

administrative employee to breach the records privacy of the adults. The employee did so on his own (Appdx. 43-45). In testifying, the employee proceeded without the release required by federal and state statutes and rules, breaching the privacy of the records. It was foreseeable that sooner or later the patients would learn that they had revealed intimate information to an imposter and that this would cause mental anguish and suffering to the victims.

The administrative employee was later convicted (Appdx. 17) by the state ethics board (sitting as an administrative law tribunal) of practicing psychology without a license and violating mental health privacy statutes. The charges to which he plead guilty including his disclosures before and at trial and his taking the stand to offer a professional psychological opinion. No immunity of the employee for what he did putatively pursuant to the master's order was recognized by the Administrative Law Tribunal.

Petitioners claimed in their suit, among other things, invasion of privacy and intentional infliction of mental distress. Petitioners complained that the mental health facility was negligent in knowingly allowing its administrative employee instead of a licensed psychologist to do the work; in not questioning the validity of the order(s); in not properly interpreting the orders by failing to follow the statute governing the report; and in not preventing the unauthorized disclosure of protected records.

The trial court granted summary judgment for defendants (Appdx. 1-11) holding that the administrative employee and the mental health facility were immune from all charges because the clinical evaluations and the report were court ordered.

**Questions Presented**

1. When an administrative employee of a mental health facility substitutes himself for the licensed clinician and performs a putatively court - ordered clinical evaluation, has

he committed a non-immunized, actionable invasion of privacy rights guaranteed by Article IV of the United States Constitution, by Article III of the West Virginia Constitution, by federal and state statutes, and by the Common Law, and is that employee likewise not immunized against a suit for damages due to infliction of emotional distress upon the patient's learning that the evaluator was not a licensed psychologist?

2. When a mental health facility provides putatively court-ordered services for clients but goes beyond the order by disclosing client records: (a) not explicitly required by the order, (b) which are protected by federal and state statutes and rules, (c) violating pre-disclosure client agreements, and notice and/or consent requirements of the statutes and rules by means of : (a) written reports, (b) unauthorized conversations with adverse attorneys, and (c) at trial as a witness for an adverse party - does the judicially created immunity for providers of services and for expert witnesses shield them from civil liability for violations of the statutory privacy rights of clients?

3. What is the liability of a mental health facility and it's employees for a prohibited release of records pursuant to a court order without notice to the client, when inquiry by the facility would have revealed: (a) the court lacked the statutory authority to mandate the release; (b) the individual signing the order lacked the statutory authority to sign the order; (c) the order required client consent prior to medical records release which was neither sought nor given by clients; and (d) state and/or federal law and rule prohibited the disclosure required by the order?

4. Is a person referred to a mental health provider by a putative court order a client/patient entitled to the confidentiality of records?

## List of All Parties

**Petitioners / Plaintiffs Below:**

Ronald Jarmuth;
Angela Frinzi (now married and known as Angela Jarmuth)
Counsel for all above:

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**Respondents / Defendants Below:**

Brian Krolczyk;
Valley Comprehensive Community Mental Health Center, Inc.;
Monongalia County, WV Board of Education (2)
Counsel for all above:

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Harrison County, WV Board of Education (1)(2)

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Clarksburg WV 26302-1370
304-326-7347

Notes:
(1) Harrison County has requested notices be sent as above.
(2) Boards of Education were Defendants to a separate lawsuit to enforce West Virginia law that Angela Frinzi's

daughter attend her local school in Harrison County, not a school 3 counties away in Monongalia County where neither parent nor child lived or worked, after the Family Law Master ordered her daughter de-enrolled from parochial school in Harrison County and enrolled in a public school 3 counties away ignoring the refusal by the local elected school board to consent. which approval is required by state law. The Circuit Court of Monongalia County joined the school suit with the Invasion of Privacy Suit at the request of common counsel for the mental health facility / the employee / Monongalia schools.

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## PRIOR ORDERS IN CASE

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October 1, 2003 Order of the Circuit Court of Monongalia County, West Virginia, granting summary judgment to defendants Appdx 1.

May 22, 2003 Consent Order of the West Virginia Board of Examiners of Psychologists sitting as an Administrative Law Court, In The Matter of Brian Krolczyk, PhD. Appdx 17.

May 4, 2001 Orders of Family Law Master that Ronald Jarmuth and Angela Frinzi undergo clinical evaluations, Appdx 14 (Frinzi order omitted from Appendix; identical except for name & ssn).

## JURISDICTION

1. The order of the Supreme Court of Appeals of West Virginia refusing, without explanation, the Petition for Appeal, which was a final order of the highest court of a state.
2. It was entered on April 15th, 2004.
3. There was no petition seeking nor order granting a rehearing.
4. This petition was filed within the 90 days allowed, which expires on July 14th, 2004, and is thus within the time allowed under 28 USC 2101(c).
5. The jurisdiction of this court is invoked under 28 USC § 1257.

## STATUTES

**CONSTITUTIONS**


U.S. Constitution - Amendment IV – ..... 20
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**NOTICE TO DISINTERESTED PARTIES**

The Clerk of Court has been notified in writing of Petitioner's belief that the Boards of Education, former nominal defendants, have no interest in the outcome of this petition as provided by Rule 12, paragraph 6. A copy of the notice was served upon them in accordance with Rule 29 paragraph 3.

## CONCISE STATEMENT OF THE CASE

1. **Stage in Proceedings.** Summary judgment was granted defendants by the trial court. The state supreme court declined, without comment, the petition for review by appeal.
2. The **federal questions** sought to be reviewed were raised by petitioners' in their Response in Opposition to defendants' (in the trial court) Motion for Summary Judgment (applicable citations at Appdx 47-49), in petitioners' Additional Response (Appdx 49-56) and were repeated on in the Petition for Appeal. to the WV Supreme Court. (Appdx 56-57). The issue of invasion of petitioner's right to privacy of petitioner's mental health status and their medical records guaranteed by the federal and state constitution, statutes and rules, and professional negligence for unauthorized disclosure are counts in the original complaint. The issue of immunity was raised by defendants in their motion for summary judgment and was opposed in the cited responses and petition of petitioners (plaintiffs below) to the WV Supreme Court where petitioners stated that they would not have consented to be evaluated by Krolczyk and would have told him nothing if they were aware that he was merely an administrative employee, not a psychologist; where it was cited that Krolczyk's disclosures in his report violated federal and state law and rules; and where it was cited that there was a written client agreement, violated, regarding confidentiality and release of patient records which was signed by defendants and petitioners prior to submitting to treatment. The release of medical

information to the court (and others) without proper notice and release was raised in Petitioner's "Additional Response to Defendants ... Motion for Summary Judgment" as was the issue that Krolczyk talked and wrote to an adversarial attorney about details of petitioners' protected records without a release and that Valley did not protect patients from it's administrative employee impersonating a psychologist and learning details of intimate details of people's private lives that he was not entitled to hear, nor from the negligence of it's employees in failing to protect it's clients medical records from unauthorized release by the administrative employee.

3. In the responses petitioners questioned the immunity of defendants incident to court ordered services, noting that the spoken disclosure to the Guardian Ad Litem was not authorized in the putative court order; that the order did not direct release of the clinical records (but rather the report of investigation about the child); that it did not authorize any release without the consent of the clients; and that even when testifying as an expert, qualified or not, Krolczyk had no authority to breach records privacy without client consent.

## REASONS TO ALLOW WRIT

### I. Violation of Statutes

1. The stated public policy of the states and the federal government is to prohibit the unlicensed practice of psychology (WVC 30-21-3, Appdx 30). The states see this as so harmful (WVC 30-21-1, Appdx 28) that such conduct is deemed criminal. This is even more heinous when the unlicensed practice is performed within and sanctioned by a legitimate mental health facility and the licensure, training and experience of the unlicensed individual is misrepresented to unknowing and trusting clients / patients.

2. The practice of professions is governed in all states by state law and regulated by professional boards or bodies

within the state executive branch.. Such regulation is not for the benefit of the members of the profession but to protect the public from the damage which unqualified individual can wreak on the public. The federal government has recognized this by including within statutes and rules relating to the performance and billing of medical and mental health procedures a restriction that such procedures may only be performed by individuals licensed by their appropriate state boards.

3. In West Virginia the legislature has stated the concern about such damage in WVC **30-21-1. Legislative findings and declaration of public policy** (Appdx. 28), where it stated " that in the public interest persons should not engage in the practice of psychology in this state without the requisite experience and training ... to protect the interests of the citizens of this state from the unauthorized, unqualified and unregulated practice of psychology. ... the practice of psychology affects the general welfare and public interest of the state and its citizens; ... that the evils of such unauthorized and unqualified practice may be best prevented and the interest of the public best served by regulating and controlling such practice as provided in this article."

4. Likewise states and the federal government have recognized the need to assure the privacy of disclosures (WVC 27-3-2, Appdx. 27) made in the context of obtaining services from such facilities, due among other things to the mental harm which is consequentially inflicted upon clients when learning that their intimate secrets have been disclosed to persons to whom they would never have made such a disclosure. This recognition is likewise reflected in federal (42 CFR 2.6, 45 CFR 164, Appdx. 20-25) )and state statutes and rules (WVLR 17-3, Appdx. 26). Outside of commitment proceedings tightly regulated to assure due process and to protect individual liberties, there are no situations where a person can be compelled to make any disclosure to a mental

health professional, whether immunity of the occasion is assured or not.

5. The recourse of an individual against a person or facility which utilizes an unlicensed individual or which violates privacy rights protected by statute includes ethics complaints to the state licensing board. Such boards, however, have no authority when the individual has not even applied for supervised status, which denies such a board jurisdiction. If the individual or facility has applied for supervision or licensure the board then has jurisdiction. But the action of the board is not to remediate the damage which has been visited upon the individual but rather to punish for disregarding and to compel obedience to the law of the state. As the statutory complaint forms recite, individuals harmed by unlicensed practice or by unauthorized disclosure must obtain relief through civil action.

6. The prohibition on unauthorized practice and unauthorized disclosure, at least in West Virginia, are stated in statutes, not in the legislative rules of the licensing board. They reflect the seriousness with which such infractions are regarded. The federal government likewise bars such unauthorized practice and disclosure through 42 CFR 290 (Appdx 20) and 45 CFR 164 (Appdx 23-24). Where the WV legislature felt that exemption from violation of the restrictive statutes was merited it stated such exemptions in explicit law. The WV statutory exemptions are WVC 29-12A - employees of political subdivisions acting with the scope of their employment; WVC 27-16-3 - surgeons performing procedures in mental institution in emergency situations; WVC 30-3-10a - special volunteer medical personnel; WVC 30-3C-2 - persons filing ethics complaints; WVC 48-16-504 - employer immunity to withholds support payments; and WVC 18-2-53 - school employees reporting students without a birth certificate. The failure of the WV legislature to enact some escape from the prohibition on unlicensed practice of psychology and unauthorized disclosure of records should

be taken that all such infractions are prohibited. In the previously quoted statute of legislative intent, WVC 30-21-1, it is clear that, the restrictive legislation is meant to protect the public, not the state. In WV all statutes which convey personal rights or protections are actionable by civil suit - WVC §55-7-9. (Actions for Injuries) Violation of statutes which provides that "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

7. The immunity against civil suit is judicially created and has heretofore been asserted against civil liability for errors and omissions in the performance of the specific service ordered by the court by individuals who could lawfully perform those services. In the case at bar the order in question was unlawfully (WVC 48A-4-9 -13 -15 -20 Appdx 31-32) issued by a master not delegated the minimal authority of even a judge pro tem. The WV Supreme Court, by refusing the petition for appeal and hence adopting the finding of the trial court , has superseded the legislative intent of the state legislature and of the Congress by expanding that immunity to encompass all employees of the mental health facility and to include acts which constitute crimes. The granting of immunity presents the unusual circumstance that before the trial court (in the case appealed from) granted the immunity - and hence summary judgment in favor of defendants - the administrative employee (who had subsequently applied to the licensing board for the beginning of a period of supervised practice, and thus became after-the-fact subject to the board's jurisdiction) had been convicted (Consent Order Appdx 17) by the Board of Examiners of Psychologists - sitting as an administrative law tribunal - of the illegal practice of psychology (WVC 30-21-2, Appdx 28) and of breaching the records privacy of these petitioners, the very charges which the trial court held

that employee immunized from. There is little if any case law to be found regarding immunity from civil liability for torts defined as crimes committed by such providers incidental to serving as providers of putatively court ordered services. The WV Supreme Court, by refusing the petition for appeal, has left the situation perilously ambiguous.

8. All states have relatively uniform statutes prohibiting such conduct which statutes have the same effect as the Code of Federal Regulations likewise prohibiting such conduct. Heretofore the immunity asserted by the employee has never been claimed and no case has been found where it has ever been granted in like circumstances. It is appropriate for this Court to state whether this expansion of the immunity of providers of court ordered services is an acceptable limitation on liability for the statutory restriction on (un)professional conduct or is a necessary concession to secure the availability of providers of putatively court-ordered services.

## II. Mental Health Record Privacy: Individual Constitutional and Statutory Rights

1. In West Virginia, as in most if not all states, whether communications between a provider of mental health services and a client are deemed legally privileged is not left to a judicially created privilege but is stated by statute. WVC 27-3-1 (Appdx 27, confidential information ; disclosure, Communications and information) includes all the information which could conceivably be protected by the judicially created privilege stated in Jaffee v Redmond, 518 U.S. 1; 116 S. Ct. *1923; 135 L. Ed. 2d 337,* No. 95-266.

2. In WV there are three instances in statute (WVC 27-3-1) which limit that broad protection against unauthorized disclosure, the first two of which are cited in that statute. The **first** is the disclosure of the results of involuntary commitment proceeding, where the examination has been ordered by a court after a hearing with extreme due process

protections for the "client", or where a licensed professional believes that his client is imminently likely to harm himself or others . In this instance the record is involuntarily created - but the "client" still has the opportunity to limit the creation of that record by remaining silent, and not participating. In the case at bar the master was naked of any lawful authority to issue the order of referral, lacking the legitimate power of even a judge pro tem. The **second** exception occurs where the record exists and a court of competent jurisdiction enters an order "based on a finding" that the " information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality" which is in direct juxtaposition to the privilege of Jaffee. 45 CFR 164 has a similar exception which appears to be juxtaposed to the privilege of Jaffee: 164.512(e)(i) (Apppdx 24-25) states "In response to an order of a court ..., provided that the covered entity discloses only the protected health information expressly authorized by such order". It would appear that a federal court could not order such a disclosure but a state court could, which leaves the confidentiality of records uncertain. In Jaffee this Supreme Court held "that uncertain privileges are disfavored".

3. Not every state court order is enforceable against the confidentiality of records mandated by federal CFR. 42 CFR 2.64 (Appdx21-22) "Procedures and criteria for orders authorizing disclosures for noncriminal purposes", prescribes a mandatory procedure which must be followed to obtain such an order including how the application must be made, how the hearing must be conducted, the determinations which must be made, and even the wording of the order and the protections for the client which the order must contain.

4. 42 CFR 2.64 (a) reflects an apparent finding by the federal government that the protection against involuntary disclosure afforded in federal courts by Jaffee should be limited to the case law exceptions to Jaffee. The CFR

provides only three instances where a state or federal court may order the disclosure of a record: (a) to protect against an existing threat to life or of serious bodily injury; (b) to investigate a crime; and (c) to impeach a client who voluntarily decides to testify about or offer as evidence some of that confidential record in a civil proceeding.

5. In the case appealed from the court orders (Appdx 14) did not even begin to meet the protective procedures mandated by the CFR. There was no application for such an order, no notice, no hearing, no finding of facts, and none of the mandatory protections which the CFR requires to be included in an enforceable order. Further, exceptions (a) and (b) did not apply and neither of the petitioners to this court stated an intent to discuss the Valley Comprehensive Community Mental Health Center, Inc. record or to offer evidence from it. Thus when adversary attorney Debra Bowers did in fact offer the confidential records of both petitioners at trial against petitioner Frinzi without the consent of either petitioner, and when employee Krolczyk likewise testified as to the details of the record and sessions without consent – it was a disclosure which the family law court was not allowed to order.

6. The statement of mandatory procedures which the CFR specifies implies that the records holder must validate and memorialize in writing its compliance with the rule. If the disclosure had been sought from the records custodian or from a licensed professional of the facility, it is possible that a refusal or at least an objection would have been raised. The employee, Krolczyk, was neither the facility records custodian nor a licensed professional. Recognizing Krolczyk's shortcomings in this area, as part of the professional board's punishment it required him to undergo additional training in ethics and related law.

7. There is a **third instance** in West Virginia and in most, if not all states, where the contents of a mental health record is not privileged. That is pursuant to abuse and neglect proceedings regarding a child, which in WV is a "Chapter

49" proceeding. WVC 49-6-4 provides for a court to order a suspected abuser to undergo an examination by a mental health professional and for the record of that examination to be disclosed to the (closed) circuit court. The WV Supreme Court, in a recent decision, made certain pertinent findings. In case In Re: Daniel D and Samantha D, No. 29965, 211 W. Va. 79; 562 S.E.2d 147 (2002), decided February 22, 2002, that [1] court noted that "in considering instances where a court could order a parent to a medical or mental examination, (it) was able only to cite the provisions of Chapter 49 of the code relating to child abuse and neglect proceedings in the Circuit Court. WVC 49-6-4(a)." It noted that the statute provides that the adult can refuse to undergo the examination and that "the court shall not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination." which is identical to the general rule that no conclusion may be drawn when a person invokes any privilege or the 5th Amendment to the United States Constitution. It held that the only "involuntary" examination relating to a proceeding involving a child which a WV court might order was relating to a Chapter 49 abuse and neglect proceeding and that the privilege of refusing such an examination and being protected from the drawing of any inferences likewise applies. In Re Daniel D provides authority that the order of the family court requiring clinical evaluations in the context of modification of a parenting plan was invalid in terms of state law, without needing to cite the deficiencies of failure to comply with the CFR.

8. It makes a mockery of any right of confidentiality if the holder of attorney, clerical, medical, or mental health records disclosed every detail of a privileged session to an

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[1] The father in In Re: Daniel D. refused to submit to the examination claiming it violated his 5th Amendment rights and that he could not trust Child Protective Services to obey the law regarding restricted disclosures, arguing that once such material got out it might be used to impeach him in related criminal charges – he denied the allegations of abuse and neglect.

adversarial party without the consent of the client. It is a further subversion of privacy rights if the supposed clinician agrees to and testifies as an "expert" witness for the adversarial party, discussing the details of the client's privileged mental health records material - and no non-privileged information.

9. The right of records confidentiality is meaningless if it can not be enforced through civil suit for damages for it's breach when the privilege has been breached without prior notice and opportunity to prevent the breach.

10. The trial court's finding that the written and verbal disclosures by the employee were immunized because the family law court (via its unauthorized master) had ordered a report is a direct attack on the applicable federal statutes cited and on the WV case In Re: Daniel D. It ignores the point that the putative order required all necessary client consents to first be obtained, that the putative order required a report concerning the child's needs (not the clinical histories of the petitioner clients), ignored that a family law master had no authority (WVC 48-A-4-9, Hearing Procedures, Appdx 31 to sign such an order (he was allowed only to recommend such an order to a circuit court judge), and that no statutory authority existed to compel the creation of the record through an involuntary clinical evaluation.

11. In Northwestern Memorial Hospital v John Ashcroft, Attorney General of the United States, No. 04-1379 in the US Court of Appeals for the 7th Circuit, 362 F.3d 923;58 Fed. R. Serv. 3d (Callaghan) 173 March 26, 2004, the appellate court upheld a district court which quashed a subpoena to compel records so as to gain evidence in criminal investigation. The appellate court wrote that the government's belief that there was a "possibility that it may find something" was insufficient to breach "the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, 110 Stat. 1936" which enacted the citations of 42 CFR raised in this petition. On point as to petitioner Ronald Jarmuth, who

was not a party to the family court proceeding, the Court held that "the potential loss of privacy that would ensue were these medical records used in a case in which the patient was not a party" was unacceptable and that courts must aggressively protect the confidentiality of records guaranteed by HIPAA, citing "the natural sensitivity that people feel about the disclosure of their medical records" which is "the sensitivity that lies behind HIPAA".

12. A finding by the United States Supreme Court is appropriate to vindicate the authority of the federal government to regulate professional conduct where such regulation has been held lawful and to return the rights to seek civil redress when such protective statutes are violated.

**III. Confidentiality of Records Exists In All Situations Where a Client Obtains Services from a Provider of Mental Health Services.**

1. The trial court held that because the family law master ordered petitioners to arrange for a clinical evaluation to be arranged by the mental health facility they had no client rights and were not clients. This issue was specifically rejected by counsel for petitioners' in their Responses in Opposition to Defendants' Motion for Summary Judgment.

2. Petitioners cited that they (and the representative of the facility) signed voluntary Client Rights Agreements - "Valley Haelthcare System Client Rights - Authorization for Treatment" (Appdx 58) the first words of which read "As a client of Valley HealthCare System you have the right" (Appdx. p 58). These agreements provided for confidentiality of records, control by the client over services (and right to refuse services), and exercise of civil rights; that they had the right to refuse to give consent for treatment and release of records; and that they signed a contract with the provider obligating them to pay for the services rendered. The payment agreement gave the facility the right to sue these petitioners if they failed to pay for the services. The agreement in effect stated that in exchange the facility would

provide the agreed upon services. The trial court held that none of this constituted a contract and that petitioners were not clients.

3. The definitions of 42 CFR 164 (Appdx 23) do not depend upon the circumstances in which a record is created, upon the existence of a contract, upon payment agreements, or upon the reason(s) an individual receives services.

a. All records of a covered provider are subject to confidentiality restrictions, which includes, per 45 CFR 164.501(1) "the medical records and billing records about individuals" and "**any item,** collection, or grouping of information **that includes protected health information** and is maintained, collected, used, or disseminated by or for a covered entity." A covered entity does not have a protected and an unprotected set of records - especially where, in the case of Valley Comprehensive Community Mental Health Center, Inc. - there is only one common records system. Petitioners' files were placed within the common Valley system of records and were retrievable by their unique names and social security numbers.

b. Rather than use the phrase "client" or "patient", the CFR refers to a "direct" or "indirect" treatment relationship, both of which create a protected set of records. A "Direct treatment relationship" is defined where a healthcare provider provides treatment. A direct or indirect treatment relationship exists where a "health care provider typically provides services or products, or reports the diagnosis or results associated with the health care". In preparing the billing report for the services he provided, the employee Krolczyk utilized standard procedure codes used to provide clinical services, such codes having been defined by the State of West Virginia for federal Medicaid and Medicare billing. During 2001, when the services were provided, approximately 95% of Valley's billing was through Medicare and Medicaid.

c. Psychotherapy notes, while filed apart from most other records (for reference by a clinician) are considered

protected records by the CFR (they are uniquely retrievable by patient name and/or social security number). 45 CFR 164.501(1) defines psychotherapy notes as "notes recorded (in any medium) by a health care provider ... documenting or analyzing the contents of conversation during a private counseling session". Krolczyk's exclusive contact with petitioners was in a single (each petitioner) session; he used those notes in his unauthorized discussions with Debra Bowers (the adversary attorney for the child), and in his unauthorized testimony at trial on behalf of Bowers. [2]

d. The services rendered by Krolczyk as an employee of Valley constituted "treatment" within the definition of the state statute (WVC 30-21-2, Appdx 28) and the federal rule which defines treatment as "the provision, coordination, or management of health care and related services by one or more health care providers". Clinical evaluations clearly are "related services" (WVC 30-21-2(d) and (e)(vi) Appdx 29).

4. The restrictions on disclosure stated by 42 CFR 164 relates to information in the provider's system of records, without reference to how they got there. Clearly the protections afforded by the federal rule are applicable to anyone receiving services, under any circumstances, by a covered provider.

5. During the testing and face-to-face clinical sessions Krolczyk attempted to learn whether petitioners had habits, including drug and alcohol abuse, which might reflect adversely on them. Whether he found such abuse existed or not, the situation constituted the context for the diagnosis of drug and alcohol abuse.[3] 42 USC Sec. 290 provides additional confidentiality restrictions under such circumstances, irrespective of the circumstances under which the diagnostic situation took place. Subsection

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[2] Despite Bowers' request, the Court refused to seat Krolczyk as the Court's witness, stating that Bowers might call Krolczyk as her witness.

[3] Krolczyk reported that he found that Petitioner Frinzi's ex-husband and girl friend had at a potential for alcohol abuse.

dd(3)(a) provides that " Records of the identity, diagnosis, prognosis, or treatment of any patient ... shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section". The disclosure restrictions (2.63 and 2.64) are identical to those stated in 42 CFR 164 previously stated.

6. The procedures were titled "clinical evaluations" (Jarmuth Report, Appdx 33; reports as to all adults identical in form). West Virginia statutes 27-3-1(a) define any information collected in conjunction with an "evaluation" as "confidential information". The statute further indicates that a person subjected to "treatment or evaluation" is a "client or patient". The restricted information includes "opinions formed regarding a client's or patient's physical, mental or emotional condition" - which is exactly what employee Krolczyk disclosed in his report, in his discussion with Bowers, and in his putatively expert testimony at trial. Ignoring the fact that the order was for a report concerning the child, which was never rendered, the WV statute (WVC 27-3-1(b)(3) Appdx 27) provides that an order for disclosure is only valid if it results from a hearing at which the court makes an evidentiary "finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section". No hearing was ever held, no finding (in the report or elsewhere) was ever made. It is noteworthy that the information provided by Krolczyk said nothing factual regarding the parenting skills of Petitioner Angela Frinzi and said nothing regarding Ronald Jarmuth's relationship (if any) with the child.

7. It is thus clear that the trial court clearly erred in finding that a contract and client relationship had to (and did not) exist to entitle petitioners to the right of confidentiality of their records, and that petitioners were not clients of the mental health provider - and that such a finding is clearly opposite the statutory provisions of federal and West

Virginia law. The effect of the refusal of the WV Supreme Court to review the judgment of the trial court is to adopt this erroneous conclusion within West Virginia. It is appropriate for the U.S. Supreme Court to specifically address this issue so as to assure the same protection of records of citizens in that state as are afforded - by operation of federal law - to citizens in all the states and to enforce the federal mandate in that state.

**Relevant Facts and Considerations of Law**

**I. Trial Court's Finding That a layman may impersonate a psychologist,**

priest, doctor or attorney so as to hear the intimate details of a client's life which would not be related by the client if the client knew that the professional was actually a layman, and no recourse exists if the client had been ordered by the court to obtain psychological services from the mental health facility. The trial court held that because Petitioners were at the mental health facility, Valley, pursuant to a court order, Valley and it's employees were immunized against liability for any and all misdeeds committed by Krolczyk.

1. Krolczyk was an administrative employee (deposition Appdx 43) who impersonated a psychologist (Consent Order of Licensing Board Appdx 17). The clients were given a written document by the mental health facility stating that the individual was a psychologist (Appdx 34). The management of the mental health facility knew that the employee was impersonating a licensed psychologist and practicing psychology illegally. Impersonating a licensed psychologist, Krolczyk asked questions about and received answers regarding intimate details of both Petitioners' lives.

2. The court's orders for investigation (Appdx 14) cited WVC §48-11-301, Court-ordered investigation (Appdx 30), and stated that the investigation regarded the "Allocation of Custodial and Decision-Making Responsibility for Children". It appointed Valley as the "investigator". Paragraph 5 of the Orders required Valley to obtain releases

from Ronald Jarmuth and Angela Frinzi prior to the performance of the investigation (and the report) and allowed Jarmuth and Frinzi to refuse any consent for cause. In their response to Defendants' Motion for Summary Judgment, Petitioners pointed out that they would never have consented to being evaluated by Krolczyk if they suspected that he was an imposter.

3. The Order for investigation stated that the "Fact Finding Investigation" was ordered "pursuant to West Virginia Code §48-11-301." The statute (Appdx 30) provides that the investigation and report are limited to collecting "information about the child and the potential parenting or custodian arrangements." The statute provides that the court "*may refer the child to professional personnel for diagnosis.*" There is no authority for court ordered services for an adult . The court expressly ordered that the child NOT be evaluated. Thus while Jarmuth and Frinzi were ordered to cooperate with the investigator - and permitted to refuse anything for good cause - the information which they were expected to provide which might be disclosed in the investigator's report was, per the statute, "information about the child and the potential parenting or custodian arrangements" and not details of the mental health of the adult petitioners. This is expressly significant as to Jarmuth as he was not a parent nor a step parent, and did not exercise any custodial duties towards the child. Per paragraph 6 of the order (Appdx 15) a child who has reached the age of 12 had the right to refuse to talk to the investigator. Certainly Jarmuth, an adult non-parent, and Frinzi, an adult, had the right to refuse to talk to Krolczyk and would have if they had known he was an imposter.

4. As pointed out in their Response to Defendants' Motion for Summary Judgment, prior to allowing any interview or tests Jarmuth and Frinzi signed the same documents as are signed by all other Valley patients undergoing any psychological services, including a statement of patient rights (co-signed by Krolczyk) and a statement of obligation

to pay. The authority of the Court was limited to requesting that Jarmuth and Frinzi cooperate with Valley as investigator determining facts about the child; their agreement to undergo a clinical evaluation which they had the right to refuse to (per the order) was not a waiver of their rights which they gained when Valley accepted them as clients. Jarmuth and Frinzi explicitly told Krolczyk that they rejected the notion that the order required them to undergo a clinical evaluation, and that they were accepting such services in the capacity as a client with all the rights of a patient.

5. The Agreement of Client Rights (Appdx 58) which was signed by Krolczyk and Jarmuth and (separate agreement) Frinzi recited that they had the rights to "refuse services" "confidentiality of records" the "exercise (of) civil rights" and to "be informed". The civil rights agreed to by Valley include the right to restrict the circumstances under which the intimate details of one's private life would be divulged, and to whom.

6. The trial court's assertion that Krolczyk and Valley are immune to recourse for his impersonation calls out for the United States Supreme Court to clarify the issue of the recourse of victims of professional impersonation. The application of immunity is wrong for several reasons:

(a) If the family law master (possessed lawful authority under state law which he did not) had meant to order a clinical evaluation to gain information of evidentiary value in formulating a parenting plan for the child, such an order is prohibited by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), codified as 42 CFR 2.6 and 45 CFR 164. It would be an appropriate vindication of the protection offered by HIPAA if the United States Supreme Court clarified that where a court has the authority for and orders clinical services, the performance of those services by an unlicensed individual who thus penetrates the private thoughts of an individual is a violation of their

constitutional and statutory right to privacy and is actionable in all circumstances.

(b) Jarmuth was not a party to the parenting plan proceeding and the family law master had no personal jurisdiction over him;

(c) Such an order as it was established has no authority in West Virginia law and is prohibited by 45 CFR 164. If the court lacks the authority to order such an evaluation it lacks the authority to grant immunity for rendering the ordered services.

**II. Trial Court's Finding That unauthorized disclosure of a patient's mental health records is immunized if the facility provided court ordered services.**

1. The trial court resolved (Order granting summary judgment to defendants, Appdx 1) the conflict between (a) statutory confidentiality of records as recited in federal and state statutes and (b) the improper behavior of the provider and it's employee in favor of allowing improper behavior which violates explicit statutes. The trial court asserted that the judicially created concept of immunity arising from court- ordered services excused all the unlawful acts that ensued. This ruling undermines the protections embodied in statutorily mandated procedures which must be followed to obtain disclosures. The trial court explained that the evidentiary needs of a court overcomes any infirmity in observing rights protected by statute. The trial court's decision is particularly offensive because Jarmuth was not a party to the proceeding and had no notice nor opportunity in court to object to the unauthorized disclosures. His mental health records that were disclosed had no relevance to the judicial objective stated by the (family) court which was to determine the special needs of the child, if any, so as to reflect them in a modified parenting plan.

2. Krolczyk was not the custodian of records at Valley. Jarmuth and Frinzi had a signed statement of client rights guaranteeing them the "confidentiality of records" and the

"exercise of civil rights". They had been verbally assured that no release would be made without prior notice to them and under no circumstances without a prior written release by them. Both federal and state law prohibited a release without the clients' consent, even in the face of a court order which failed to meet the standard of HIPAA (as noted in Northwestern Memorial Hospital v Ashcroft, op.cit.). The (family) court proceeding did not concern the mental health status of the clients and neither petitioner stated their intention to raise that issue or their records.

3. Krolczyk released the entire contents of petitioners' files to the Court and to adversarial parties with no prior or subsequent notice or client release. Krolczyk ignored the requirement of federal law to make a record of the release in Valley's files and to mark the records with a statement prohibiting re-release or use.

4. Subsequently, still with no notice or release, he discussed the details of his clinical sessions and his clinical conclusions with Debra Bowers, an attorney for an opposing party. She in turn (without release or notice) used the details of the clinical sessions and the clinician's clinical conclusions against the clients in court papers she filed and at a trial in the family court (she knew Krolczyk was not a psychologist but nevertheless referred to him in her report (Appdx 40) and at trial as a "licensed psychologist" and as a "psychologist"). Krolczyk did not record his conversation with Bowers or his testimony at trial in Valley's files, another violation of federal law. At trial he lied under oath (Appdx 42) about his licensure status, training and experience. As Krolczyk later testified in a deposition (Appdx 42-45), he had no expectation that he would ever testify at trial, and he had never testified in any capacity at a trial before. Thus these disclosures had nothing to do with any privilege as a fact or expert witness at trial.

5. The trial court explained it's conclusion by stating that the family court ordered that Valley provide it a report, citing WVC 38-11-301 and that Bowers was a named

recipient of the report. Regarding the order, the trial court was silent on how the master had lawful authority only to recommend that a Circuit Judge issue such an order, and that a master could compose and recommend but not sign such an order himself (WVC 48A-4-9, -13 -15 -20, Appdx 31-33). This explanation also fails because, as previously explained, the putative order (Appdx 14) stated that Valley was to take no action which required a release by the clients until it received such a release, because the statute defines the report as one relating to the child's needs, because the order allowed the clients to make any and all refusals for good cause, because federal and state law prohibits such a disclosure and require a clinician to notify his client and to refuse an unlawful order made without hearing, because federal and state law provide no authority for the family law court to order the disclosure of the records of anyone but the child (and she can refuse if over 12) and because the order made no provision for protection of the records from re-release or for their destruction after use in the proceeding.[4]

6. It is notable that the reports (Jarmuth, Appdx 35; all other reports identical in structure) did not say one word about the child but dealt exclusively with the clients. The reports had no probative [5] value in modifying a parenting plan to reflect the relocation of the primary custodian.

7. It is our position that the clear and explicit statutory protections of 42 CFR 164 and other statutes and rules as to confidentiality are not surrendered in the face of a court order for services. The decision of the trial court below indicates that there is a need for this Supreme Court to enter an order clarifying the limits of the immunity of a mental health facility and it's employees when putatively court

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[4] In a later order the law master refused petitioners' demand for records destruction, after the trial, which is required by 42 CFR 164.

[5] In the Order granting summary judgment the trial court in this matter noted that the reports (Appdx 9) were "hearsay" and inadmissible by themselves.

ordered services are performed and federally protected confidentiality rights are violated.

**III. Trial Court's Finding That unauthorized disclosure of a patient's mental health records at trial is immunized if discloser is called as an expert witness (by opposing counsel).**

1. With no authorization from Valley management Krolczyk agreed to use his confidential knowledge to assist Bowers to litigate against Frinzi. With notice to Frinzi's attorney the evening prior to the hearing on the parenting plan and no notice to Jarmuth, Krolczyk appeared at the hearing / trial as an "expert witness" for Bowers, lying under oath about his licensure status, training and experience (Appdx 42, 46) in order to qualify as an expert. The suit under appeal to this Court does not challenge the master's seating Krolczyk as an expert, no matter how erroneous it was (the Family Master knew that Krolczyk was lying under oath about his licensure status, training and experience, but failed to disclose this to the parents). It is conceded that as an expert Krolczyk is immunized from offering an opinion based on evidence he is allowed to refer to. The family court refused a request by Bowers at trial to seat Krolczyk as the court's witness or to order him to testify so as to insure his immunity from subsequent litigation.
2. Krolczyk brought with him the confidential client records with no authorization from the clients and no record of disclosure at Valley. His testimony was exclusively regarding confidential records of clients, and he eventually offered an opinion on custody which he stated was based exclusively on the confidential client records. Counsel for Frinzi objected to his testifying about his sessions and conclusions drawn from those sessions. Jarmuth had no such opportunity being excluded from the courtroom as a non-party.
3. In the suit appealed to this Court Petitioners asserted that appearing as an expert witness did not allow Krolczyk

to testify about the confidential records – that he was only allowed to testify about and draw conclusions from non-privileged material, and he had no such material. Petitioners claim that Krolczyk and Valley are liable for invasion of privacy and intentional infliction of emotional distress from the consequences of his use of privileged communications. The trial court in this case held that as an expert witness Krolczyk was immune from litigation regarding anything which occurred while he was on the stand.

4. This interpretation has the practical effect of voiding the confidentiality restrictions of state and federal law, because this interpretation means that an opposing litigant or the court need merely recruit the clinician (or the party's former attorney, doctor or pastor) or an employee of the mental health facility, name him as an expert witness, and gain access to the privileged (attorney – client, pastoral, medical, or mental health) records through distribution of same as "underlying data" supporting the expert witness' testimony at trial. Using the direct testimony of the "expert" regarding privileged communications between a party and his clinician / attorney / pastor / doctor voids any protection of rights supposed to be shielded by the privilege, and irretrievably taints the reliability of what the trial court bases the ultimate decision upon. This extension of immunity eviscerates all confidentiality rights and privileges, not just the mental health records confidentiality of 42 CFR 164 (and other similar statutes and rules). The trial court held that the client has no recourse against a "professional" or the professional's employees who has violated the confidentiality rights of the client.

5. The trial court's application of total immunity to all acts when a person has served as an expert witness and has violated the confidentiality rights of a client is such a broad rejection of established law and judicial doctrine that it merits an unambiguous rejection of this unlimited extension of the doctrine of judicially created expert witness immunity.

6. It is notable that:

(1) Krolczyk was not the custodian of records at Valley.

(2) Debra Bowers was appointed by the Family Law Court as the Attorney for the Child, and took on the role of a hostile adversary (party).

(3) Krolczyk and each client had signed a Valley "Client Rights - Authorization for Treatment" which assured the "confidentiality of records"; he verbally assured petitioners that no release would be made, not even per a court order, unless the clients signed a release which conforms to that specified in federal law. He specifically told Jarmuth that no report would even be contemplated until after Jarmuth had first seen any draft report and had approved it. Krolczyk reneged on these commitments.

(4) The order stated that "a written report shall be prepared in this matter pursuant to West Virginia Code §48-11-301." Subsection (b) of that statute limits the investigation to "information about the child" and the diagnosis of "the child" performed by professional personnel. Krolczyk was not a "professional" and Jarmuth's and Frinzi's mental health records held by Valley were not "information about the child". Paragraph 8 of the order mandated that the report would comply with subsection (c) of WVC 48-11-301, which limits the contents of the report to data collected "pursuant to the provisions of subsection (b) of this section " - meaning information about the child released per consents of the child if he/she is over 12.

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29 June, 2004

(2)
Supreme Court, U.S.
FILED
04 30 JUL 30 2004
No.

IN THE
# Supreme Court of the United States

RONALD JARMUTH
AND
ANGELA FRINZI

*Petitioners*

v.

BRIAN KROLCZYK,
VALLEY COMPREHENSIVE COMMUNITY MENTAL HEALTH CENTER, INC,
MONONGALIA COUNTY, WV BOARD OF EDUCATION,
AND
HARRISON COUNTY, WV, BOARD OF EDUCATION

*On Petition For Writ Of Certiorari*
*To The Supreme Court of Appeals of West Virginia*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## ORDERS OF COURTS

**October 1, 2003 Trial Court Order Granting Summary Judgment to Defendants.**

**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA DIVISION II**

RONALD E. JARMUTH and
ANGELA FRINZI,
Plaintiffs,

v. CASE NO. 02-C-346
Russell M. Clawges, Jr., Chief Judge

BRIAN KROLCZYK, Individually and
in His Capacity of "Acting Director Clinical Services" for
Valley Community Mental Health
and
VALLEY COMPREHENSIVE COMMUNITY MENTAL HEALTH CENTER, INC. d/b/a Valley Healthcare System, and MONONGALIA COUNTY BOARD OF EDUCATION,
Defendants.

**ORDER GRANTING DEFENDANTS, BRIAN KROLCZYK AND VALLEY COMMUNITY MENTAL HEATH CENTER'S. MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on the 22' day of August, 2003, on the Defendants' Motion for Summary Judgment pursuant to Rule 56 of the *Rules of Civil Procedure.* The Defendants appeared by counsel, Jacquelyn J. Core for Brian Krolczyk and Valley Comprehensive Community Mental Health Center, Inc. and Carolyn A. Wade for the Monongalia County Board of Education; and the Plaintiffs appeared in person and by counsel, Pamela P.. Folickman.

The Court has reviewed the Defendants, Brian Krolczyk and Valley Comprehensive Community Mental Health's, Motion for Summary Judgment; Plaintiffs' Response to the Defendants' Valley Comprehensive Community Mental Health and Brian Krolczyk's Motion for Summary Judgment; Plaintiffs' Additional Response to Defendants' Valley Comprehensive Community Mental Health and Brian Krolczyk's Motion for Summary Judgment; and Reply of Defendants Valley Comprehensive Community Mental Health Center, Inc. and Brian Krolczyk to Plaintiffs' Additional Response to These Defendants' Motion for Summary Judgment. Furthermore, the Court has considered all papers of record, heard the arguments of counsel, and reviewed pertinent legal authorities. As a result of these deliberations, for the reasons set forth in the following Opinion, the Court hereby GRANTS Defendants, Brian Krolczyk and Valley Community Mental Health's, Motion for Summary Judgment. [1]

**FACTS AND PROCEDURAL HISTORY**

Plaintiff, Angela Frinzi, was a party to a custody proceeding in the Family Court of Monongalia County, Judge Jeffrey Culpepper presiding. Pursuant to the proceeding, Judge Culpepper ordered Valley Community Mental Health (Valley), Attention: Brian Krolczyk, Ph.D. (Dr. Krolczyk), to conduct a clinical evaluation of Plaintiffs, Ms. Frinzi, as well as Mr. Jarmuth, who cohabitated with Ms. Frinzi. Dr. Krolczyk administered the Minnesota Multiphasic Personality Inventory II (MMPI-II), and the Brief Psychiatric Rating Scale - Anchored (BPRS-A) to both plaintiffs. Additionally Dr. Krolczyk submitted a Clinical ]:valuation report, testified as to the results of *the* tests and gave recommendations to the Family Court. Dr. Krolczyk was at

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[1] The Court granted Defendant, Monongalia County Board of Education's, Motion for Summary Judgment on August 22, 2003.

that time neither a licensed psychologist, nor a supervised psychologist; yet he interpreted the MMPI. Interpreting the MMPI requires either a degree and licensed supervision or license to perform the test. However, Plaintiffs' expert conceded that he could not recall any clinical misstatements in Dr. Krolczyk's interpretation. Plaintiffs' expert further stated that he did not question Dr. Krolczyk's interpretation skills. Dr. Krolczyk testified that he was "under supervision for licenseship," when in fact he was not. As a result of the proceeding, Ms. Frinzi was denied custody of her daughter.

Plaintiffs, Angela Frinzi and Ronald Jarmuth filed suit against defendants Valley and Dr. Krolczyk. In their complaint, Plaintiffs alleged the following causes of action: breach of contract, breach of the standard of care, negligence, loss of future income, libel and slander of the plaintiffs' good name, bad faith, intentional infliction of emotional distress, conspiracy, invasion of privacy, and impersonating a licensed psychologist. Following the hearing on Defendants' Motion for Summary Judgment, Plaintiffs abandoned the medical malpractice, libel, and intentional infliction of emotional i distress claims.

## DISCUSSION

When considering a Motion for Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, the Court must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to judgment as a matter of law." These basic 4 principles concerning summary judgment were set forth in Aetna Casualty and Surety Co. v. Federal Insurance Co., 148 W.Va. 160, 133 S.E.2d 770 (1963).

> *A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry*

*concerning the facts is not desirable to clarify the application of the law.*

Id. Syllabus Point 3. These principles were recently reaffirmed by the West Virginia Supreme Court of Appeals in Painter v. Peavey, 192 W.Va. 189, 451 S.E.2d 755 (1994).

A party who moves for Summary Judgment has the burden of showing that there is no genuine issue of material fact and that any doubt as to the existence of such issue is resolved against the movant for such judgment. Id. Syllabus Point 6. "Roughly stated, a'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed `material' facts." Syllabus Pt. 5, Jividen v. Law, 194 W. Va. 705, 461 S.E.2d 451 (1995) (in part). "An issue is `genuine' when the evidence relevant to it, viewed in the light most favorable to the party opposing the motion, is sufficiently open ended to permit a rational fact finder to resolve the issue in favor of either side." Syllabus Pt. 2, Gentry v. Mangum, 195 W. Va. 512, 466 S.E.2d 171 (1995) (in part).

Moreover, in Painter v. Peavey (Syllabus Point 3) the West Virginia Supreme Court of Appeals noted the language of Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), that the Circuit Court's function at the Summary Judgment stage is "not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249.

If a movant is successful in showing that there is no genuine issue of material fact, the burden of production shifts to the non-movant. Williams v. Precision Coil, Inc., 194 W.Va. 52,459 S.E.2d 329 (1995). The non-movant must go beyond the pleadings and set forth specific facts that

demonstrate that there is a genuine issue for trial. Powderidge Units Owner's Association v. Highland Properties, Ltd, 196 W.Va. 692, 474 S.E.2d 872 (1996).

> *If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.*

Williams, 194 W.Va. at 56, 459 S.E.2d at 333.

Summary Judgment is proper in this case because there is not sufficient evidence favoring the Plaintiffs for a reasonable jury **to return a verdict for then Also, Plaintiffs cannot** point to one or more disputed material facts, as required by Syllabus Point 5 in Jividen, 194 W. Va. 705,461 S.E.2d 451. The Court finds there is no genuine issue for trial.

The Court first speaks to Plaintiffs' allegation of breach of contract. Plaintiffs cite Black's Law Dictionary as the most basic *definition of* a contract being "an agreement between two or more persons which creates an obligation to do, or *not to do a* particular thing." However, the West Virginia Supreme Court of Appeals more specifically defines a contract as "an offer and acceptance is supported by consideration." Art's Flower Shop. Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc., 186 W. Va. 613, 616-17, 413 S.E.2d 670, 673-74 (1991) (citing Syl. Pt. 1, First Nat. Bank of Gallipolis v. Marietta Mfg. Co., 151 W. Va. 636, 153 S.E.2d 172 (1967)). The Court further identifies the "`fundamentals of a legal `contract' [as) competent parties, legal subject matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are

not in agreement.'" Syl. Pt. 9, Ways v Imation Enterprises Corp., ___ S.E.2d ___2003 WL 215 37728 (W. Va. July 07, 2003) (quoting Syl. Pt. 5, Virginian Export Coal Co. v. Rowland Land Co., 100 W. Va. 559, 131 S.E. 253 (1926)).

Plaintiffs cite to two alleged contracts. The first alleged contract is the Court's Order for j Investigation entered by Judge Culpepper for evaluations of Mr. Jarmuth and Ms. Frinzi. A court order is inherently not a contract. A court order is just that, an *order*. It allows for neither offer and ' acceptance, nor consideration. Moreover, a court order certainly lacks mutual assent. An order is accomplished at the direction of a judge, not upon assent of all the parties. The Court finds that Judge Culpepper's Order for Investigation did not create a contract. Second, plaintiffs allege that the agreement that each Plaintiff signed with Valley prior to the evaluation constitutes a contract. The document is entitled "Valley Healthcare System Client Rights-Authorization for Treatment." The purpose of the document is to inform Valley clients of their rights. The document is not a contract; it is simply a list of patient rights. Even if the document was a contract, the record contains no evidence of a breach. One of the rights identified is "[c]onfidentiality of records." Valley and Dr. Krolczyk afforded this right to Plaintiffs to the extent possible, while still complying with the Order for Investigation. The only disclosure Dr. Krolczyk made in regard to Plaintiffs' examination was enuring, and in accordance with the custody proceeding. Outside of the Order for **Investigation, both** Valley and Dr. Krolczyk maintained confidentiality of Plaintiffs' records.

Plaintiffs also assert that a contract existed because they paid for the examination. The mere fact that the Order for Investigation required Plaintiffs to pay the cost of the examination, does not constitute a contract. The Court finds no offer and acceptance between the parties; nor does the Court find mutual assent. Rather, all parties were acting in conformity with Judge Culpepper's Order for Investigation.

As a result, the Court grants summanry judgment in favor of Defendants on Plaintiffs' breach of contract claim.

Next, Plaintiffs' negligence claim does not stand outside of a malpractice claim. When Plaintiffs dismissed the *malpractice* cause of action, the practical effect was also a dismissal of the negligence cause of action. Thus, the Court grants summary judgment in favor of Defendants on Plaintiffs' negligence claim.

Plaintiffs also assert loss of future income as a cause of action. The Court finds that loss of future income is not a recognized cause of action, but rather a question of damages. As a result. the Court does not address Plaintiffs' loss of future income claim.

Furthermore, the Court finds that Plaintiffs do not meet their burden with respect to establishing a cause of action for slander. The elements for a prima facie case of slander include (1) a defamatory statement, (2) nonprivileged communication to a third party, (3) falsity, and (4) injury. Syl. Pt. 1, Crump v. Beckley Newspapers, *Inc., 173 W. Va. 699,320 S.E.2d* 70 (1983). Plaintiffs' cite to Dr. Krolczyk's testimony as the alleged slanderous communication. More specifically, Plaintiffs allege that Dr. Krolczyk's *opinion* that the child would be better off with her father was "truly slanderous to the PlaintiffFrinzi." Plaintiffs cannot establish the element of falsity in this claim though because "[a] statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection. Pritt v. Republican Nat'l. Comm., 210 W.Va. 446, 557 S.E.2d 853 (2001). Moreover, "whether a statement is one of fact or opinion is an issue that must be decided initially by a court." Syl. Pt. 7, Long, v. EQnor. 176 W. Va. 628, 346 S.E.2d 778 (1986). Based on Plaintiffs' own assertions that Dr. Krolczyk wai giving his *opinion* and the context of the testimony, the Court finds that Dr. Krolczyk's statement was one of opinion, and not of fact. Therefore, the Court grants summary judgment in favor of Defendants on Plaintiffs' claim for slander.

Plaintiffs' claim of bad faith must also be dismissed. West Virginia has no recognized cause of action for bad faith outside of the insurance context. Plaintiffs' do not assert insurance involvement in this case. Accordingly, the Court grants summary judgment in favor of Defendants on Plaintiffs' bad faith claim.

Plaintiffs' next claim, conspiracy, also must be dismissed. "In order for civil conspiracy to be actionable it must be proved that the defendants have committed some wrongful act or have committed a lawful act in an unlawful manner to the injury of the plaintiff." Syl. Pt. 1, Dixon v. American Industrial Leasing Co., 162 W. Va. 832, 253 S.E.2d 150 (1979). Likewise, "[a] `conspiracy' requires at least two persons, and a corporation can act only through its agents or employees." Cook v. Heck's Inc., 176 W. Va. 368, 375, 342 S.E.2d 453, 460 (1986) (citing Dixon, 162 W. Va. at 834, 253 S.E.2d at 152). Here, the only defendants alleged to have committed Plaintiffs' causes of action are Dr. Krolczyk and Valley. Because "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage," the conspiracy claim cannot stand. Cook, 176 W. Va. at 375, 342 S.E.2d at 460 (quoting Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 72, 35 Cal.Rptr. 652, 665 (1963)). There is no question that Dr. Krolczyk was acting in his official capacity during all phases of the custody proceeding. Nothing in the record indicates.that Dr. Krolczyk had an individual interest in the outcome of the proceeding. Dr. Krolczyk was clearly acting on behalf of Valley. The investigator identified in the Order for Investigation was "Valley Community Mental Health, Attn: Brian J. Krolczyk, Ph.D." The Order did not suggest that Dr. Krolczyk was to conduct the investigation in his personal capacity. Even if Valley and Dr. Krolczyk could conspire, there is still no conspiracy because no wrongful act was committed, nor was a lawful act in an unlawful manner

committed, as required by the West Virginia Supreme Court of Appeals. Thus the Court grants summary judgment in favor of Defendants on Plaintiffs' conspiracy claim.

Plaintiffs' claim for invasion of privacy is dismissed because Plaintiffs lack the necessary elements for this cause of action. "An `invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable i publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. Pt. 8, Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70 (1983). The record indicates the existence of none of the elements to establish a claim for invasion of privacy.

Within the invasion of privacy argument, Plaintiffs contend that Dr. Krolczyk and Valley violated W. Va. Code § 27-3-1 by releasing their records without a properly executed release. This argument is without merit. Again, Dr. Krolczyk was merely complying with the Order for Investigation. Plaintiffs maintain that the Order was limited to Dr. Krolczyk providing the Family Court with a written report, but he was not to testify. Such a claim is absurd. Without Dr. Krolczyk's testimony, his report would be inadmissible hearsay and the Order for Investigation would have been fruitless. Furthermore, Plaintiffs' contention that Dr. Krolczyk testified outside of the scope of the Order is an issue that should have been dealt with during the proceeding in the form of an objection. Therefore, the Court grants summary judgment in favor of Defendants on Plaintiffs' invasion of privacy claim.

Finally, Plaintiffs' claim of impersonating a licensed psychologist must also be dismissed because the Court finds no such private cause of action to exist in West Virginia or any other jurisdiction. Additionally, Plaintiffs provided no authority for such cause of action, even when specifically requested to do so by the Court. As a result, the Co in grants

summary judgment in favor of Defendants on Plaintiffs' claim of impersonating a licensed psychologist.

While noting the concern that Dr. Krolczyk, testifying as an expert, was not what everyone thought he was; the Court finds no cause of action under which Plaintiffs' claims may be brought. On the issue of immunity, the Court finds that immunity docs attach to a witness retained by the Court. "[T]he danger presented in not extending immunity to these court-appointed experts would result in psychologists avoiding future.and the fear of civil liability would mar opinions and recommendations provided to the courts." Todd v. Angelloz, 844 So.2d 316, 320 (La. 2003). While Dr. Krolczyk was neither a licensed, not supervised psychologist, he did have a Ph.D. in psychology and substantial experience. Much like the fact- in Gustafson v. Mazer, 54 P.3d 743 (Wash. 2002), where the court found full witness immunity, Dr. Krolczyk "had no role as a psychologist independent of [his] participation in the litigation, and [he] had no professional relationship with [the Plaintiffs]."

The Court does not overlook the situation when an expert is not what s/he holds his or herself out to be. There, the misinformation may abrogate immunity. Nonetheless, under the facts of this case, even if immunity did not apply, even if a private cause of action existed for impersonating a licensed psychologist, the fact remains that Plaintiffs present no evidence that Dr. Krolczyk's opinions were not inconsistent with his examination, or the testimony of other witnesses. Plaintiffs offer no criticism of Dr. Krolczyk's interpretations or opinions. Furthermore, Dr. Krolczyk was not the only witness to offer recommendations to the Family Court in this matter. The Plaintiffs challenged the decision of Family Court both in the Circuit Court of Monongalia County and the West Virginia Supreme Court of Appeals. Neither Court overturned the decision. Plaintiffs exhausted their remedy with their petition for appeal. The Court cannot

allow for unsubstantiated claims simply because parties to an action were dissatisfied with the outcome.

## CONCLUSION

The Defendants' Motion for Summary Judgment is GRANTED, and the Plaintiff's suit against the Defendant is DISMISSED with prejudice.

The Court further *directs the* Monongalia County Circuit Clerk's Office *to* distribute copies of this Order to all counsel of record IT IS SO ORDERED.

Entered this 1st day of October 2003

Russell M. Clawges, Jr., Chief Judge 17" Judicial Circuit, Division II

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk

**April 15th, 2004 Order of West Virginia Supreme Court of Appeals denying petition for appeal.**

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15`' of April, 2004, the following order was made and entered:

Ronald E. Jarmuth and Angela Frinzi,
Plaintiffs Below, Petitioners
vs. No. 040267
Brian Krolczyk, individually and in his capacity of "Acting Director Clinical Services" for Valley Community Mental Health and Valley Comprehensive Community Mental Health Center, Inc., d/b/a Valley Healthcare System, and Monongalia County Board of Education, Defendants Below, Respondents

On a former day, to-wit, February 4, 2004, came the petitioners, Ronald E. Jarmuth and Angela Frinzi, by Pamela R. Folickman, their attorney, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Monongalia County, rendered on the Pt day of October, 2003, with the record accompanying the petition.

Thereafter, on the 23" day of February, 2004, came the respondents, Brian Krolczyk, et al., by Nancy W. Brown, Amy M. Smith and Jacquelyn J. Core, Steptoe & Johnson, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard would grant.

A True Copy

Clerk, Supreme Court of Appeals

Attest:

**Order of Family Law Master Culpepper, May 4, 2001, that non-party Ronald Jarmuth submit to Clinical Evaluation by Valley Community Mental Health**

**IN THE FAMILY COURT OF MONONGALIA COUNTY, WEST VIRGINIA**
**IN RE: THE CHILD OF ANGELA JO FRINZI AND JAMES MICHAEL FRINZI**

ANGELA JO FRINZI, PETITIONER,
vs.
JAMES MICHAEL FRINZI, RESPONDENT.
CIVIL ACTION NO: 01-D-45

**ORDER FOR INVESTIGATION**

WHEREAS this matter came on for hearing before the Family Law Master, on the 30th day of April, 2001. The Family Law Master finds that one of the issues currently pending before this Court is **the Allocation of Custodial and Decision-Making Responsibility for Children** (or the enforcement or modification thereof) pursuant to WV Code Chapter 48 Article 11. The Family Law Master further finds that a Court-Ordered Fact Finding Investigation is necessary and appropriate in this matter pursuant **to West Virginia Code §48-11-301.**

**IT IS THEREFORE ORDERED:**

1. An investigation shall be performed and **a written report shall be prepared in this matter pursuant to West Virginia Code §48-11-301**.

2. The scope of the **investigation** shall be: CLINICAL EVALUATION OF PETITIONER'S **FRIEND** Ronald Edwin Jarmuth, SSN: ***-**-3612 d.o.b.: May 17,1944

3. The investigator shall be: **VALLEY COMMUNITY MENTAL HEALTH**, Attn: Brian J. Krolczyk, Ph.D., Acting Director Clinical Services, Valley HealthCare System, Inc.

301 Scott Avenue, Morgantown, WV 26505 (304-296-1731 ext. 241, fax-293-5322) bkrolczvk a@,vallevhealthcare.org

4. Within **10 days** of the entry of this Order, the person to be evaluated and named in paragraph 2 above shall contact the investigator named in paragraph 3 above to schedule an appointment for the evaluation. ....

5. When the investigation and report concern an adult, the investigator shall have the following authority: to arrange for and interview the person to be evaluated; to conduct tests; to refer the person to other appropriate experts for interviews, testing, or diagnosis; to consult with any person who may have information about this matter; to consult with and obtain information from medical, psychiatric or other expert persons who have served this person in the past; and any other powers reasonably necessary to complete the investigation described above. **The person to be evaluated shall execute any and all authorizations necessary to allow the above investigation to be performed**, unless there is a legitimate objection to such consent, in which case, the objection must be filed in writing by the objecting party within 10 days of the request for the consent, with copy to the investigator and copy to the Family Law Master. Failure to timely file an objection in writing shall be deemed a waiver.

6. **When the investigation and report concerns a child under the age of eighteen**, the investigator may consult any person who may have **information about the child** and the **potential parenting or custodian arrangements**. The investigator may refer **the child** to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric or other expert persons **who have served the child** in the past, without obtaining the consent of the parent or the child's custodian. However, **the child's consent must be obtained if the child has reached the age of twelve**, unless the court finds that the child lacks the mental capacity to consent ....

7. In light of the available financial resources, the above ordered investigation shall not be conducted at a cost of less than $180 nor more than $600, inclusive of any additional evaluations required by the investigator, without prior Court order. The fees incurred to conduct the above investigation shall be paid as follows: ...

XX Private pay, with any un-reimbursed portion paid 100 % by *Petitioner* ... .

8. Pursuant to WV Code § 48-11-301 (c), upon completion of the above investigation, the investigator shall, at least 10 days prior to the hearing scheduled for July 17, 2001, 3:00p.m., prepare a written report and shall provide copies to the Family Law Master at 271 Spruce St. Morgantown, W V 26505 (285-3228/fax-3161) and all of the parties and/or counsel listed below in paragraph 9.

9. Upon entry of this Order, the Family Law Master clerk shall provide a copy hereof to:

A) Petitioner: Angela Jo Frinzi, 31 Wexford Way, Bridgeport, WV 26330 (842-0877)

B) Petitioner's Counsel: Patricia Hill, Esq. 954 Maple Dr. Morgantown, WV 26505 599-5959/5985

C) Respondent: James M. Frinzi, PO Box 276 Chalk Hill, PA 15421 (724-439-9168)

D) Respondent's Counsel: Michelle Widmer- Eby, 211 New Jersey Ave. Morgantown, WV 26501 (296-1843/292-6810)

E) Investigator listed in paragraph 3 above.

F) GAL: Debra Bowers, Esq. 50 Clay St. Morgantown, WV 26501 (296-1100/6116)

G) Other: Ronald E. Jarmuth, c/o Petitioner

ENTER: MAY 4, 2001

FAMILY LAW MASTER
James Jeffrey Culpepper

**May 22, 2003 Consent Order of WV Board of Examiners of Psychologists, In Re Brian Krolczyk**

**BEFORE THE WEST VIRGINIA BOARD EXAMINERS OF PSYCHOLOGISTS**

**IN THE MATTER OF: BRIAN KROLCZYK, PH.D. - SUPERVISED PSYCHOLOGIST**

**CONSENT DECREE**

THIS CONSENT DECREE is made and entered into this 22nd day of May 2003 by and between the West Virginia Board of Examiners of Psychologists ("Board"), and Brian Krolczyk, Ph.D. ("Supervised Psychologist").

WHEREAS, the Board is a state entity created pursuant to W. Va. Code § 30-211 et seq., and is empowered to regulate the practice and profession of psychology within the State of West Virginia, including but not limited to the licensing and disciplining of psychologists and school psychologists.

**WHEREAS,** the Supervised Psychologist currently holds a gold card as a supervised psychologist issued by the Board.

WHEREAS, the Board has had under review a complaint against the Supervised Psychologist in connection with the Supervised Psychologist's conduct, practices and acts between December 2000 and June 2002.

WHEREAS, in connection with the complaint, the Board has determined that there is probable cause to believe that the Supervised Psychologist engaged in conduct, practices, or acts constituting a violation of W. Va. Code § 30-21-3.

**WHEREAS,** the Board is currently authorized to suspend, revoke, or otherwise discipline its licensees pursuant to W. Va. Code § 30-21-10.

WHEREFORE good and valuable consideration the parties agree each with the other as follows:

1. In connection with this complaint, Supervised Psychologist submits to the jurisdiction of this Board for disciplinary action.

2. Supervised Psychologist hereby agrees to be placed on probation and have his supervision requirement for a supervised psychologist license extended for an additional two years, beyond the normal one year period for an individual who holds a doctoral degree. Said probation and extension is to run from the date of execution of this Consent Decree by the Board. Supervised Psychologist hereby acknowledges that he is to cease and desist from performing any and all forensic psychological assessments, appearing in any judicial proceedings, and providing psychological opinions and/or recommendations for any court matters or attorneys during the pendency of this probation and extended supervisory period.

3. Additionally, Supervised Psychologist agrees to complete the following courses of study during the probationary and extended supervisory period: provided Supervised Psychologist supplies adequate documentation to the Board of satisfactory completion of said courses:

a. Two three hour ethics courses from an APA provider of continuing education per year. (12 credits for the two year period.)

b. Twenty one (21) hours of continuing education hours on forensic psychological practice from an APA approved provider of continuing education.

4. The Supervised Psychologist hereby agrees and assures the Board that he will comply with the provisions of W. Va. Code § 30-21-1 et seq., and any rules of the Board promulgated pursuant thereto, in the course and conduct of his profession as a licensed supervised psychologist.

5. It is agreed and understood that the contents of this Consent Decree are and shall be public information.

6. It is further agreed and understood that while the parties to this Consent Decree presently intend to cooperate in obtaining compliance with the terms and conditions set forth herein, the matters settled by the execution of this Consent Decree may be reopened at any time by the Board for further proceedings in the public interest upon determination by the Board that reasonable cause exists to believe that the Supervised Psychologist has failed to comply or otherwise violated the terms of this Consent Decree.

7. This Consent Decree shall be interpreted in accordance with the laws of the State of West Virginia, and venue of any lawsuit filed by any party arising in whole or in part out of this Consent Decree shall be in the Circuit Court of Kanawha County, West Virginia, and further that in the event any part of this Consent Decree is invalidated by order of a court of competent jurisdiction or by legislative action, the remainder of this Consent Decree shall remain in binding effect.

8. This Consent Decree constitutes the entire agreement between the parties.

**IN WITNESS WHEREOF the parties hereto have caused this Consent Decree to be duly executed the day and year first above written.**

**WEST VIRGINIA BOARD OF EXAMINERS OF PSYCHOLOGISTS**

**By:** ***/s/ Martin Amerikaner*****, Ph.D. President WVBEP**

***/s/ Brian Krolczyk*****, Ph.D. .**

CONSTITUTIONS

U.S. Constitution - Amendment IV -

**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated**, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

WV Constitution - Article III

3-1. Bill of rights.

**All men** are, by nature, equally free and independent, and **have certain inherent rights**, of which, when they enter into a state of society, **they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.**

3-6. Unreasonable searches and seizures prohibited.

**The rights of the citizens to be secure in their** houses, **persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.**

**Federal Rules**

**42 CFR 2.61 Legal Effect of Order.**

Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure.

**42 CFR 2.63 Confidential communications.**
(a) A court order under these regulations may authorize disclosure of confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment **only if**:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

**42 CFR 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.**

(a) **Application.** An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrunity.

**(b) Notice.** The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) **Review of evidence:** Conduct of hearing. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of these regulations. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) **Criteria for entry of order**. An order under this section may be entered **only if the court determines that good cause exists**. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) **Content of order**. An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; ....

**45 CFR 164 Privacy of Individually Identifiable Health Information**

**Sec. 164.501 Definitions.**

As used in this subpart, the following terms have the following meanings:

Designated record set means:

(1) A group of records maintained by or for a covered entity that is: (i) **The medical records and billing records about individuals** maintained by or for a covered health care provider; ...

(2) For purposes of this paragraph, the term **record means any item,** collection, or grouping of information **that includes protected health information** ...

**Direct treatment relationship** means a treatment relationship between an individual and a health care provider that is not an indirect treatment relationship.

Psychotherapy notes means **notes recorded (in any medium) by a health care provider** who is a mental health professional **documenting or analyzing the contents of conversation during a private counseling session** ... that are separated from the rest of the individual's medical record.

**Sec. 164.502 Uses and disclosures of protected health information: general rules.**

(i) Standard: Uses and disclosures consistent with notice. A covered entity that is required by Sec. 164.520 to have a notice may not use or disclose protected health information in a manner inconsistent with such notice. ....

**Sec. 164.508 Uses and disclosures for which an** authorization is required.

(a) Standard: authorizations for uses and disclosures—

(1) Authorization required: general rule. Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health

information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

(2) **Authorization required: psychotherapy notes.** Notwithstanding any provision of this subpart, other than the transition provisions in Sec. 164.532, a covered entity **must obtain an authorization for any use or disclosure of psychotherapy notes,** except: ... (A) Use by the originator of the psychotherapy notes for treatment; (B) for its own training programs ... (C) ... to defend itself in a legal action or other proceeding brought by the individual; ...

(5) Revocation of authorizations. **An individual may revoke an authorization** provided under this section at any time,

(6) Documentation. A covered entity must document and retain any signed authorization under this section as required by Sec. 164.530(j).

**Sec. 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.**

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in Sec. 164.508, or the opportunity for the individual to agree or object as described in Sec. 164.510, in the situations covered by this section, **subject to the applicable requirements of this section.**

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(e) Standard: Disclosures for judicial and administrative proceedings.

(i) In response **to an order of a court** or administrative tribunal, provided that the covered entity **discloses only the**

**protected health information expressly authorized by such order**; or

(ii) In response to a **subpoena**, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) **The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request**; or

(B) The covered entity **receives satisfactory assurance**, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that **reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v)** of this section.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, … an order of a court … that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

**Federal Rule of Evidence 501**

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, **the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law** as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and

proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

**West Virginia Rules of Evidence**
**West Virginia Rule of Evidence 501**
**The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common** law except as modified by the Constitution of the United States or West Virginia, statute or court rule.

**WV Legislative Rules**
**WVLR §17-3-6. Professional Ethics.**
The Board hereby adopts the Code of Ethics of the American Psychological Association as part of this rule, and all provisions of this Code of Ethics have the effect as if they were specifically promulgated rules of the Board."

**APA Ethics 5.02 Maintaining Confidentiality.**
Psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or professional or scientific relationships.
**APA Ethics 5.05 Disclosures.**
(a) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as (1) to provide needed professional services to the patient or the individual or organizational client, (2) to obtain appropriate professional consultations, (3) to protect the patient or client or others from harm, or (4) to obtain payment for services, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.

**Canon 3 C(5) of the West Virginia Code of Judicial Conduct**

(5) A judge shall not require any personnel subject to the judge's direction to act contrary to any code of ethics.

**WV Statutes**

**§27-3-1. Definition of confidential information; disclosure.**

(a) Communications and information obtained in the course of treatment or evaluation of any client or patient shall be deemed to be "confidential information" and shall include the fact that a person is or has been a client or patient, information transmitted by a patient ... thereof for purposes relating to diagnosis or treatment, ... all diagnoses or opinions formed regarding a client's or patient's physical, mental or emotional condition; ...

(b) Confidential information may be disclosed:

(1) In a proceeding ... to disclose the results of an involuntary examination made pursuant to (involuntary commitment examinations for cause)...

(3) Pursuant to an order of any court based upon a finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section;

(4) To protect against a clear and substantial danger of imminent injury by a patient or client to himself or another;

(5) For treatment ... to staff of the mental health facility ...

**§27-3-2. Authorization of disclosure of confidential information.**

No consent or authorization for the transmission or disclosure of confidential information shall be effective unless it is in writing and signed by the patient or client by his legal guardian. Every person signing an authorization shall be given a copy. ...

**§30-21-1. Legislative findings and declaration of public policy.**

The Legislature of the state of West Virginia hereby determines and finds that in the public interest persons should not engage in the practice of psychology in this state without the requisite experience and training and without adequate regulation and control; and that there is presently no adequate means to protect the interests of the citizens of this state from the unauthorized, unqualified and unregulated practice of psychology. It is therefore declared to be the public policy of this state that the practice of psychology affects the general welfare and public interest of the state and its citizens; that persons without the necessary qualifications, training and education, and persons not of good character should not engage in the practice of psychology; and that the evils of such unauthorized and unqualified practice may be best prevented and the interest of the public best served by regulating and controlling such practice as provided in this article.

**§30-21-2. Definitions.**

(a) "Applicant" means any person making application for an original or renewal license or a temporary permit under the provisions of this article.

(b) "Licensee" means any person holding a license or a temporary permit issued under the provisions of this article.

...

(d) "Psychology" means

the science involving the principles, methods and procedures of understanding, predicting and influencing behavior;

the principles pertaining to learning, perception, motivation, thinking, emotions and interpersonal relationships; the methods and procedures of interviewing and counseling;

the methods and procedures of psychotherapy, meaning the use of learning, conditioning methods and

emotional reactions, in a professional relationship, to assist a person or persons to modify feelings, attitudes and behavior, which are intellectually, socially or emotionally maladjustive or ineffectual;

the constructing, administering and interpreting of tests of intelligence, special abilities, aptitudes, interests, attitudes, personality characteristics, emotions and motivation;

the psychological evaluation, prevention and improvements of adjustment problems of individuals and groups; and

the resolution of interpersonal and social conflicts."

(e) "Practice of psychology" means the rendering or offering to render for a fee, salary or other compensation, monetary or otherwise, any psychological service involving:

(i) The application of the principles, methods and procedures of understanding, predicting and influencing behavior;

(ii) the application of the principles pertaining to learning, perception, **motivation**, thinking, **emotions and interpersonal relationships**;

(iii) **the application of the methods and procedures of interviewing and counseling**;

(iv) the application of the methods and procedures of psychotherapy, meaning the use of learning, conditioning methods and emotional reactions, in a professional relationship, to assist a person or persons to modify feelings, attitudes and behavior, which are intellectually, socially or emotionally maladjustive or ineffectual;

(v) **the constructing, administering and interpreting of tests of intelligence, special abilities, aptitudes, interests, attitudes, personality characteristics, emotions and motivation;**

(vi) the **psychological evaluation**, prevention and improvement of adjustment problems of individuals and groups; and

(vii) **the resolution of interpersonal and social conflicts**.

**§30-21-3. License required; firms, associations and corporations engaging in the practice of psychology.**
(a) No person shall engage in, offer to engage in, or hold himself out to the public as being engaged in, the practice of psychology in this state, nor shall any person use in connection with any trade, business, profession or occupation, except in those instances specifically excluded from the definition of the practice of psychology by subparagraphs (1), (2), (3), (4) and (6), subdivision (e), section two of this article, the word "psychologist," "psychology," "psychological" or any other title, word or abbreviation which induces or tends to induce the belief that such person is qualified to engage or is engaged in the practice of psychology, unless and until he shall first obtain a license.
(b) No firm, association or corporation shall, except through a licensee or licensees, render any service or engage in any activity which if rendered or engaged in by any individual would constitute the practice of psychology.

**§48-11-301. Court-ordered investigation.**
(a) In its discretion, the court may order a **written investigation and report** to assist it in determining any issue relevant to proceedings under this article....
(b) In preparing **the report concerning a child**, the **investigator** may consult any person who may have **information about the child and the potential parenting or custodian arrangements**. Upon order of the court, the investigator ***may refer the child to professional personnel for diagnosis***. The investigator may consult with and obtain information from medical, psychiatric or other expert persons **who have served the child.**
(c) The investigator shall deliver the **investigator's report to counsel** .... The investigator shall make available to counsel

... the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator **pursuant to the provisions of subsection (b)** of this section

**§48A-4-9. Hearing procedures.**

... (c) A family law master presiding at a hearing under the provisions of this chapter may:

(1) Administer oaths and affirmations, compel the attendance of witnesses and the production of documents, examine witnesses and parties and otherwise take testimony, receive relevant evidence and establish a record;

(2) Rule on motions for discovery and offers of proof;

(3) Take depositions or have depositions taken when the ends of justice may be served;

(4) Regulate the course of the hearing;

(5) Hold pretrial conferences for the settlement or simplification of issues and enter time-frame orders which shall include, but not be limited to, discovery cut-offs, exchange of witness lists and agreements on stipulations, contested issues and hearing schedules;

(6) **Make and enter temporary orders** on **procedural matters**, including, but not limited to, substitution of **counsel, amendment of pleadings, requests for hearings and other similar matters;**

(7) Accept voluntary acknowledgments of support liability or paternity;

(8) Accept **stipulated** agreements;

(9) Prepare default orders for entry if the person against whom an action is brought does not respond to notice or process within the time required;

(10) **Recommend orders** in accordance with the provisions of section thirteen of this article;

(11) Require the issuance of **subpoenas** and subpoenas duces tecum, issue writs of attachment, hold hearings in aid of execution and propound interrogatories in aid of execution and fix bond or other security in connection with an action for enforcement in a child or spousal support matter; and

(12) Take other action authorized by general order of the circuit court or the chief judge thereof consistent with the provisions of this chapter.

**§48A-4-13. Recommended orders.**

(b) A master who has presided at the hearing pursuant to section nine of this article shall recommend an order and findings of fact and conclusions of law to the circuit court

(c) ... The master shall file the recommended order (with) ... the circuit clerk

**§48A-4-15. Orders to be entered by circuit court exclusively.**

**With the exception of temporary support and custody orders** entered by a master in accordance with the provisions of section twelve of this article and section twenty-two, article two, chapter forty-eight of this code, and procedural orders entered pursuant to the provisions of section nine of this article, an order imposing sanctions or granting or denying relief may not be made and entered except as authorized by law. Upon entry of a final order in any action for divorce, separate maintenance or annulment, the clerk of the circuit court shall deliver an attested copy of such order to the parties who have appeared in such action or their counsel of record by personal delivery or by first class mail.

**§48A-4-20. Circuit court review of family law master's recommended order.**

... (c) The circuit court shall examine the recommended order of the family law master, along with the findings and conclusions of the family law master, ... **The circuit court shall not follow the recommendation, findings and conclusions of a master found to be**:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in conformance with the law;

(2) **Contrary to constitutional right, power, privilege or immunity;**

(3) **In excess of statutory jurisdiction, authority or limitations**

or short of statutory right;

(4) Without observance of procedure required by law;

(5) Unsupported by substantial evidence; or

(6) Unwarranted by the facts.

**Other Documents**

**May 29, 2001 Valley Letter Stating Krolczyk was a Psychologist**

May 29, 2001

To Whom It May Concern:

This is to confirm that the Circuit Court of Monongalia County issued an order for this office to conduct an investigation on its behalf. Mr. Jarmuth was ordered by the Court to meet with **psychologist. Brian Krolczyk** at this office as part of that investigation. **Mr. Jarmuth is not a party to the proceeding**. On Friday, May 25, 2001, Mr. Jarmuth met with Dr. Krolczyk as ordered by the Court.

P.J, Neer

*Monongalia County • 301 Scott Avenue, Morgantown, West Virginia 26508.8804 V 304-296-1731*
*www.valleyhealthcare.org*

**May 25, 2001 Clinical Evaluation Report about Ronald Jarmuth**
written by administrative employee Brian Krolczyk and mailed to non-court personnel as well as court.

Valley HealthCare System
301 Scott Ave
Morgantown, WV 26505
(304)-296-1731

Clinical Evaluation
****CONFIDENTIAL****

Name: Ron Jarmuth
Date of Birth: 05/17/1944 Age: 57
SSN: ***-**-3612
Date of Evaluation: 05/25/0001

REASON FOR REFERRAL

The Family Court of Monongalia County, West Virginia referred Ron to Valley HealthCare System for a clinical evaluation **to assess his personality and his potential for placing himself or others in harms way**. The purpose of the evaluation is to provide information to the **Family Law Master** that may be helpful in decision-making.

BACKGROUND INFORMATION

Ron is a 57-year-old divorced male. He has four children from a previous marriage, ages 19-31. He reports that he has an excellent relationship with his children and his previous wife. He reports that he is employed as a computer systems specialist working with the government on various computer systems projects. He states that he has numerous advanced degrees in information / computer systems technologies

Ron states that he is involved in a primary relationship with a female that is engaged in a custody dispute before the Family Court of Mon. County, West Virginia. He reports that this relationship is extremely stable and rewarding. He understands that he is being evaluated to provide information to the Family Law Master. He reports that he is very concerned that the child's natural father and his "girlfriend" are exposing the child in the custody dispute to inappropriate sexual activity.

Ron is medically stable and reports that he is in excellent physical condition. He reports no history of alcohol and substance use. He reports no history of mental illness or treatment for psychiatric / psychological needs. He reports no history of unusual or inappropriate activity, aggression, or self-destructive behavior. He states that he has a wide variety of hobbies and interests including cooking, kayaking, music, building furniture, and enjoying friendships.

## TESTS ADMINISTERED

1) Minnesota Multiphasic Personality Inventory II (MMPI-II)
2) Brief Psychiatric Rating Scale - Anchored (BPRS-A)

## BEHAVIORAL OBSERVATIONS

Ron arrived for his appointment on time. He was casually dressed, with good personal hygiene. He appears average in height and weight. I-lis greeting and subsequent test behavior was personable and well mannered. He was pleasant, cooperative, and his attitude toward testing was positive. He demonstrated a good command of the language. He appeared appropriately attentive to the test administrator and the test requirements. His affect was mildly restricted, indicative of an attempt to minimize his emotional reaction to the custody issue. He appeared moderately relaxed throughout the test administration and his range of emotional expression was within normal limits. He did not become overtly frustrated at any time during the

testing. He appeared to be egocentric and grandiose in his presentation. He appeared to greatly minimize problems in his life and underreport the level of stress he is experiencing about this custody issue and consistently elaborate on his virtues. Due to Ron's consistent effort and concentration throughout the testing, this examiner believes the following results are reliable estimates of Ron's personality. However, due to his tendency to minimize problems, the reliability of is verbal report is unclear.

TEST RESULTS

1) MMPI-2 Results (An appendix summarizing each scale is provided as an attachment) VALIDITY SCALES L T=65

He may be either a normal individual who is very self-controlled, rigid, and lacking in insight; a person who uses excessive repression and denial; or a naive and unsophisticated individual who is attempting to create a very favorable impression of himself.

F T=36 He is either denying serious psychopathology by underreporting actual problems or is actually relatively free from stress.

K T=70 He exhibits extreme defensiveness, tries to maintain a facade of adequacy and control, and admits to no problems or weaknesses. He exhibits a serious lack of personal insight and understanding of his own behavior. He may be seriously disturbed psychologically but is reluctant to look at the sources of his problems and difficulties. He is rigid, inflexible, and intolerant of unconventional attitudes, beliefs, and behaviors.

CLINICAL SCALES

1 Hs = 57 This score is considered to be within normal limits.
2 D=47 This score is considered to be within normal limits.
3 Hy=61 He often prefers to look on the optimistic side of life and avoids thinking about or confronting unpleasant issues. He is often somewhat exhibitionistic, extroverted, and superficial in interpersonal relationships.
4 Pd =48 This score is considered to be within normal limits.
5 Mf = 56 He has traditional masculine interests and activities.
6 Pa = 49 This score is considered to be within normal limits.
7 Pt = 49 This score is considered to be within normal limits.
8 Sc = 49 This score is considered to be within normal limits.
9 Ma = *51* Scores in this range are considered to be within normal limits.
0 0 Si = 37 He is socially extroverted, outgoing, and gregarious. He has a strong need to be around other people. Very low scores (< 36) suggest individuals who generally form superficial and insincere social relationships. He may be seen by others as impulsive, immature, opportunistic, and manipulative. He may have difficulty forming meaningful, intimate relationships.

2) Brief Psychiatric Rating Scale - Anchored (BPRS-A)

Ron had elevated scores on "grandiosity" and "emotional withdrawal" on the BPRS-A. These results represent a tendency to not admit to minor faults while exaggerating strengths. Additionally, Ron has a tendency to distance himself from his emotions while presenting information during the interview, providing personal information in a methodical, systematic, "businesslike" manner.

SUMMARY

Although Ron reported no significant psychiatric symptoms, self-destructive, aggressive, or sexually

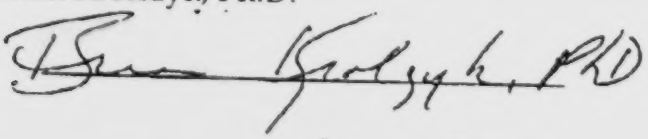
inappropriate thoughts or behaviors, his level of minimization and deliberate defensiveness make it difficult to assess his potential for risk.

Ron appears to be attempting to present himself favorably beyond what would be considered to be within normal limits. This may indicate that his tendency to minimize his problems is more indicative of his character and less likely to be associated only with the clinical evaluation itself

In reference to the validity of his clinical scores on the MMPI-2, Ron is trying to present himself in an extremely positive manner. Ile may be attempting to avoid or deny unacceptable feelings, impulses, and problems. He needs to be viewed by others as being exemplary. He is often simplistic and psychologically naive, and he tends to view the world in extremes. Pronounced use of denial and repression, poor insight, and deliberate defensiveness is suggested.

RECOMMENDATIONS

No recommendation for treatment is made at this time.
Brian Krolczyk, Ph.D.



**Guardian Ad Litem's Report September 14, 2001 Citing Krolczyk as a Licensed Psychologist**

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA IN RE THE CHILD OF:

ANGELA J. FRINZI, Petitioner,
V. CIVIL ACTION *NO.* 01-D -45
JAMES MICHAEL FRINZI, Respondent.

ANSWER OF GUARDIAN AD LITEM

NOW COMES the Guardian Ad Litem, Debra A. Bowers of Kay Casto & Chaney PLLC and pursuant to that Order entered by the Family Law Master on May 7, 2001, for Appointment Guardian Ad Litem files this Answer in the above-styled matter.

...

RESOURCES, WITNESSES AND DOCUMENTS INTERVIEWED AND/OR REVIEWED BY THE GUARDIAN IN THESE PROCEEDINGS

Witnesses

The Guardian conducted interviews with the following individuals to obtain the information which may have been included in this Guardian's Answer:

a. Linda Beeler, Ph.D. Licensed Psychologist
b. Frank J. Provenzano, Ph.D. Licensed Psychologist
c. Brian J. Krolczyk, Ph.D., **Licensed Psychologist-**

...

**November 5, 2001 Letter from West Virginia Board of Examiners of Psychologists stating that Krolczyk was neither licensed nor supervised**
(and thus was NOT a psychologist).

STATE OF WEST VIRGINIA
BOARD OF EXAMINERS OF PSYCHOLOGISTS
P.O. Box 3955
Charleston, West Virginia 25339-3955
Telephone: (304) 558-0604
Fax: (304) 558-0608

November 6, 2001

Ron Jarmouth 31 Wexford Way
Bridgeport, West Virginia 26330

Dear Mr. Jarmouth:

Per your request, this letter is to verify that Brian Krolczyk is not registered as a licensed or supervised psychologist for the state of West Virginia.

If you have any questions or need further assistance, please do not hesitate to call. Sincerely,

Elizabeth A. Williams
Administrative Assistant

**Transcript Extracts**

**Krolczyk Testimony Qualifying as an Expert Witness at trial before Family Law Master, September 14, 2001:**

Krolczyk I have a Ph.D. in Counseling Psychology from West Virginia University graduated in December of 2000 and in mental health for about 12 years now. Mental Health Practice and **I'm under supervision for licensure.**

Bowers Prior to, you said you graduated in 2000 with your Ph.D. and you've got about **12 years experience in mental health in the mental health discipline,** what did you do?"

Krolczyk I have a Bachelor's degree in psychology and a Master's Degree in Counseling, I was employed by West Virginia University in Resident's Life, in counseling students about their adjustment to College, and I was employed full time by the Community Mental Health Center in town from '93 to approximately '92 to '95; I was director of our Short Term Residential Unit which is a short term psychiatry facility for individuals who don't need to be hospitalized but aren't safe to go home.

**Deposition of Brian Krolczyk July 8 2003**

IN THE CIRCUIT COURT OF MONONGALIA COUNTY
WEST VIRGINIA

---

RONALD E. JARMUTH and
ANGELA FRINZI,
Plaintiffs

VS Civil Action No. 02-C-346
(Russell M. Clawges, Jr., Judge)

BRIAN KROLCZYK, individually and
in his capacity of "ACTING DIRECTOR
OF CLINICAL SERVICES" for
VALLEY COMMUNITY MENTAL HEALTH,

and
VALLEY COMPREHENSIVE COMMUNITY
MENTAL HEALTH CENTER, INC., d/b/a
VALLEY HEALTHCARE SYSTEM,
Defendants

---

DEPOSITION OF BRIAN JOHN KROLCZYK,

a witness herein, called by the Plaintiffs for examination, taken pursuant to West Virginia Rules of Civil Procedure, by and before Rosalie B. Eanone, Court Reporter, and Notary Public in and for the State of West Virginia, at the offices of Steptoe & Johnson, 1000 Hampton Center, Morgantown, West Virginia, on Tuesday, July 8, 2003, commencing at 9:10 a.m.

Page 5
Q And what were you doing there?
A My primary responsibilities were to manage all aspects of the outpatient mental health practice.
Q And you were Acting Administrative Director?
A That is correct.
Page 6
Q And who was your immediate supervisor?
A Dr. George Lilley.
Q And he was your administrative supervisor?
A That is correct.
Q And who is your professional supervisor?
A He was -- I didn't have a professional supervisor.
Page 9
Q Okay. Did you do counseling at Valley? Did the crisis team?
A I provided crisis intervention.
Q But no one-on-one counseling?
A No.
Q And can you tell me a little bit about your Doctorate dissertation?

A My Doctorate dissertation was an evaluation of mandatory parent education in West Virginia.

Page 11

Q Okay. Have you ever been in any private practice?

A No.

Q Okay. Had you had any meetings with Judge Culpepper prior to you being appointed to do the Frinzi evaluation?

A We did -- When he asked me if the center could provide this type of evaluation, we did discuss over the telephone what type of evaluation I could provide.

Page 14

Q And what, if you remember, code did you put on the clinical evaluation for Angela Frinzi?

A I believe I put the clinical evaluation codes.

Page 15

Do you remember how many clinical evaluations that Valley performed were performed while you were there for Judge Culpepper?

A How many evaluations I performed?

Q Yes.

A I don't recall. I was asked if I wanted to give my testimony and I don't recall how many I did overall.

Q Can you take an educated guess, say more than ten, less than ten?

A About ten.

Q Now, with these clinical evaluations, say about ten, can you recall about how many you testified in court on?

A Just this case, I believe.

Q Just one?

A Yes.

Q The other ones you did your report and sent it in and never got called to court basically?

A That is correct basically, yes.

Page 19

Q And did you and Judge Culpepper discuss custody evaluations?

A **I said I could not provide a custody evaluation**. I might have said that -- I don't remember saying this, but I might have said are you looking for a custody evaluation because **I knew I couldn't provide that**. I said I could provide a clinical evaluation because **he specifically was looking for an evaluation to identify risk factors.**

Q And do you know anybody in the area that could provide a custody evaluation at the time that you spoke to Judge Culpepper?

A A custody evaluation?

Q Yes.

A I don't know them personally but I believe there are people in town who provide custody evaluations.

Page 27

Q Okay. Did you ever discuss with Judge Culpepper your credentials?

A Um-hum.

Page 34

Q Okay. And how many custody evaluations have you performed?

A None.

**Krolczyk Actual Employment History**
taken from his Application to WVBoad of Examiners of Psychology For License Page 2 Employment History Feb 2, 2002

| From | To | Job Title | Work in Mental Health? | Years of Experience |
|---|---|---|---|---|
| Sep-00 | Feb-02 | Clinical Director | No (1) | 1 |
| Aug-99 | Aug-00 | WVU Internship | Yes | 1 |
| Apr-93 | Aug-96 | Director, Crisis Services | No (2) | 1.3 |
| Aug-91 | Apr-93 | Residence Hall Director | No | 1.6 |
| | | | | 4.9 (3) |

**Actual Experience**: **1 year**

Notes:
(1) While he wrote "Clinical Director" he was Administrative Director of Clinical Services with NO professional responsibilities, per the deposition of Valley CEO George Lilley.
(2) In his deposition Krolczyk stated his job was administrative, such as making arrangements for housing clients.
(3) His actual "mental health" experience was solely a **1 year** internship in counseling adults per Krolczyk's deposition.

**Plaintiff's Response to the Defendants' Motion for Summary Judgment, September 3, 2003**

Page 2

"It is an action against Defendants for permitting an unsupervised or unlicensed person to perform psychological evaluations at their facility "

"Defendant Krolczyk, knowing he was not a supervised or licensed psychologist, stated he was a supervised psychologist in open Court,"

"The investigator listed on the evaluation order was Valley Community Mental Health. No where in the Order does it say that Dr. Krolczyk was to perform the evaluations. The Order was only sent to his attention, probably due to the fact he was an Acting Director of Clinical Services at Valley."

Page 3

"Nowhere in the Order does it give Valley immunity to have a non-qualified person perform the evaluations."

"At the time of the Orders indicating that an investigation shall occur on Plaintiffs, Dr. Krolczyk was not a supervised psychologist, nor was he an licensed psychologist, nor had he even applied to the WV Board of Examiners of Psychologists."

Page 4

"At no time did Dr. Krolczyk indicate that he was not licensed or supervised. Dr. Krolczyk held himself out as a member of Psychologists. "

"Dr. Krolczyk did not perform any type of custody evaluation. He stated this in his testimony at court."

Page 6

"Dr. Krolczyk did not conduct a custody evaluation for the Court. Dr. Krolczyk was not a supervised psychologist and could not perform such a test under the Licensure requirements of West Virginia."

Page 7

"Non privileged communication to a third party resulted in the change of custody . Dr. Krolczyk spoke with the GAL on at least one occasion "

Page 8

"The defendant, Dr. Krolczyk did not have immunity except for the possibility of a limited immunity for the performance of the clinical evaluation under the investigator, Valley. Dr. Krolczyk did not have immunity to go beyond the scope of the investigation and report to the GAL information not in the report or to give the Court an opinion"

"In this case, the Defendant held himself out as a member of the Psycholgoical community. The Defendant did not indicate to the Plaintiff that he was just out of school, non licensed and not under the supervision of another psychologist. He was just the Acting Director of Clinical Services. This is clearly an invasion on ones privacy to revele intimate personal inforamtion to one that the Plaintiff's believed to be a psychologist capable of taking the raw data and making an evaluation under the laws of WV licensure for psychologists."

"Then after the Defendant invaded the personal information of the Plaintiff he published them in a

report to the Court and to the GAL and the other parties. This report has been disseminated on numerous occasssions without the consent of the Plaintiffs."

Page 8-9

[Intentional Infliction of Emotional Distress] "On the face of the elements the plaintiffs have shown all thoughout the course of this litigation that due to Dr. Krolcyczk's actions and outrageous conduct by performing testing, making recommendations and opinions to the GAL and the Court "

**Plaintiffs' Additional Response to Defendants Motion for Summary Judgment**

Page 2

"The Plaintiffs were Court Ordered to Valley Healthcare for an Clinical Evaluation. The Plaintiffs complied with the Orders and went to Valley Healthcare."

"The Plaintiffs paid for services."

Page 3

"The Plaintiff Frinzi has standing to bring this action since she was a party to the underlying case in which the Defendants breached the confidentiality of her records. "

"The Plaintiff Jarmuth has standing to bring this action since he was subject to the Court Order for Investigation and his information was presented to the Court without the proper releases."

"The case cites: LLMD of Michigan, Inc, v. Jackson-Cross Co., 740 A. 2d 186 (Pa. 1999) in which the Court held " that witness immunity should not protect expert witnesses who do not " render services to the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession." The Louisiana Court also considered the policy interests of witness immunity and noted in Marrogi v. Howard, 805 So. 2d 1118, 1133 (La. 2002) " we do not see how the freedom to testify negligently will result in more truthful expert testimony. without some overarching purpose, it would be illogical, if not unconscionable, to shield a professional, who is otherwise held to the standards and duties of his profession, from the liability for his or her malpractice simply because a party to a judicial proceeding has engaged that professional to provide services in relation to the judicial proceeding and that professional testifies by affidavit or deposition. "

Page 4

" **The Plaintiffs contend that the Defendant Valley was appointed by the Court Order to conduct a "clinical evaluation "of each of the Plaintiff under W. Va. Code § 48-9-301. The scope of the investigation clearly indicates what the Defendant was to perform for the Court. The Defendant's contention then goes to subsection (b) of this section indicating that " in preparing the report concerning the child, .... the investigator may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past.... Clearly, neither of the Defendants provided any services to the child of the Plaintiff, Frinzi. The Defendants try to use this**

**section of the Code to avoid the necessarily of the Plaintiffs' providing a release for the Defendants to convey any information to any other source, except the written report that the Order provides the Defendants to provide to the Court."**

"Clearly, under W. Va. Code § 27-3-1 which defines the confidential information as " shall include the fact that a person is .... all diagnoses or opinions formed regarding a client's or patient's physical, mental or emotional conditions, ..."

"If given that immunity would apply to those appointed by the Court to aid the Court in its investigation, then the immunity would ONLY apply to the specific request from the Court to the Investigator. In the Defendants' citing the Delcourt v. Silverman, 919 S. W. 2d 777 (Tex. App. Houston 14th Dist. 1996) case indicated that the immunity would extend to the expert for the services that the Court authorized the expert to perform."

Page 5

"Here the Court ONLY ordered an investigation and in that Order the investigator was to provide a report to the Court. **Nowhere in this Order was the investigator to provide testimony to the Court. Nowhere in the Order was the investigator to do anything beyond the scope** of the Court. The Order did give the investigator the following authority under paragraph 5, but only was **this authority to be used to complete the investigation as described in the Scope of the order.**"

"Neither Plaintiff ever signed a release for the Defendant to communicate with the Guardian ad litem (GAL) in the case. The Defendants are trying to say

that if immunity applies to the Defendant to perform the clinical evaluation then immunity would apply to anything else that the Defendant did if in any way the actions could be connected to the clinical evaluation. "

"The Defendant Krolczyk went beyond the scope of the Order for Investigation when he spoke with the guardian PRIOR to trial without a release from the Plaintiffs. The Defendant was negligent by not first obtaining a release from the Plaintiff to speak to the GAL concerning their treatment./clinical evaluation."

"The Defendant Valley was negligent by not protecting the records under their care by permitting an employee to divulge this information to a third party without the proper releases from the Plaintiffs."

Page 6-7

"There is a clearer issue of the lack of immunity for the Defendant Krolczyk and Valley when the Defendant Krolczyk spoke with the GAL with out a release from either of the Plaintiffs. The Defendant in his testimony at Court indicates that he spoke with the GAL prior to his testimony in Court. The Defendants have no immunity for this communication, it was not pursuant to any Court Order nor was it authorized by the Plaintiffs. "

Page 7

" It was clearly outside the scope of any immunity that may apply pursuant to the Court issuing the Order of Investigation. "

"It is clear that the Defendant was negligent when he testified to the Court over and above the scope of this investigation. It is clear the Defendant was negligent when he spoke with the GAL prior to the trial. "

"The WV Board of Examiners of Psychologists found in their Consent Decree (attachment #7 to the Plaintiffs original Response to Summary Judgment) indicated that there was probable cause to believe that the Supervised Psychologist engaged in conduct, practices or acts constituting a violation of W. Va. Code § 30-21-3."

Page 8

"The Plaintiffs have shown that the Defendants both Valley and Krolczyk breached the Plaintiff's privacy. Every person has a right to privacy and especially the Plaintiffs had a right to believe that the Defendants, both Valley and Krolczyk, would keep the information provided them confidential except for the report that the Defendant would provide to the Court, pursuant to the Order of Investigation. Under Allen v. Smith, 179 W. VA. 360, 368 S. E. 2d 924 (1988) the Court held there is a private tort cause of action for the violation of W. Va. Code 27-3-1 (1977) "

"The Defendant Valley had a duty as custodian of the Plaintiffs records to keep the records confidential under the duty the defendant had to the plaintiff under the client-patient relationship. Valley was negligent by not providing this duty of confidentiality to the Plaintiffs records. "

"The Defendant Krolczyk had a duty as an employee of Valley to maintain the confidentiality of the records of his patients, the Plaintiffs, unless provided with a release of information by the Plaintiffs permitting him to provide any other type of information to a third party except for the written report to the Court as indicted in his Order of Investigation from the Court. The Defendant Krolczyk was negligent by not providing this duty of confidentiality to the Plaintiffs' records."

"The Defendant Krolczyk had a duty to the Plaintiffs to keep their information confidential until such time as the Defendant had the proper releases from the Plaintiffs. There was no urgency to discuss this information with the GAL with out first obtaining the releases from the Plaintiff. In Court the Defendant could have postponed his verbal release of the information and obtained the permission from the Plaintiffs to release the information. "

Page 8-9

"The Defendants breached the confidentiality of the Plaintiffs by releasing their records without a properly executed release. This beach was a violation of W. Va. Code 27-3-1 for which the Plaintiffs have suffered damages. The issue of the amount of damages is an issue for the jury to decide for each individual Plaintiff. In this case, the Plaintiff Frinzi has been damaged by the negligence of the Defendants to a greater extent in that she has lost custody of her child, wages, emotional damages, expense for counseling and other expenses"

Page 9

"...the Family Court took notice of the Defendant Krolczyk as an expert without first qualifying him under the Rules for Civil Procedure. The Defendant Krolczyk was not noticed by any of the parties as an expert. The Plaintiffs did not have any prior notice that he would be considered by the court as anything other than an witness. The Plaintiffs' due process was violated. Given that the Court qualified the Defendant Krolczyk as the expert, he was still had the obligations of confidentiality to the Plaintiffs and

should not have given testimony outside the scope of the investigation or without the proper releases from the Plaintiffs. "

"The Defendant Krolczyk, although he testified in his deposition that he felt the need to answer the question in Court, he should have known that this question was outside the scope of the Order for Investigation and refused to answer until he had the proper releases. The Defendant Krolczyk was negligent when he provided the answer to the question in court concerning the information of the Plaintiffs without a proper release."

[Intentional Infliction of Emotional Distress:] "Plaintiff Frinzi has been damaged by ... emotional damages, expense for counseling ..."

Page 10

"The Plaintiff Jarmuth was not a party to the underlying case in Family Court. He was just the fiancee of the Plaintiff Frinzi. ... When the Defendant Krolczyk gave his opinion to the Court which was not part of the Order of Investigation by the Court, without a release, was publication for both the Plaintiffs and therefore, the Plaintiffs have met the elements of invasion of privacy. "

"Even if the Court was to uphold the issue of immunity for the Defendant Krolczyk per the Order of Investigation, the spoken opinion by the Defendant Krolczyk was clearly outside the scope of the Order and the Scope of the immunity that the Defendants are trying to claim as their defense. The defamatory works were spoken by the Defendant. These words were that the Plaintiffs should only have supervised visitation

with the child, a clear diversion from the written report submitted to the Court by the Defendant Krolczyk. "

"A defense to the action of slander is the truth. Nowhere did the Defendants show that the Defendant Krolczyk was testifying about the truth of the Plaintiff. The Defendant took the written reports submitted to the court with his summary and recommendation as that "No recommendation is made at this time" for both of the Plaintiffs. Then to tender to the Court an opinion, after the Court qualified him as an expert that in his opinion the child would be better off with Jim. These statements are truly slanderous to the Plaintiff. "

**Plaintiff's Petition for Appeal to the WV Supreme Court of Appeals, February 4, 2004**

Page 4

Dr. Krolczyk was at that time neither a licensed psychologist, nor a supervised psychologist; yet he interpreted the MMPI in violation of West Virginia law. [9] Interpreting the MMPI requires either a degree and licensed supervision or license to perform the test, Dr. Krolczyk was neither. [10] Furthermore, Dr. Krolczyk testified before the court that he was "under supervision for licenseship," when in fact he was not.

Page 9

It is reasonable that if the Petitioners were aware that the evaluation would be conducted by an unlicensed or unsupervised psychologist, who would then go on and testify outside the scope of his investigation, the Petitioners would have objected to the assent.

Page 11

The second document, titled Valley Healthcare System Client Rights-Authorization for Treatment, provides

numerous additional clauses that evidence an agreement or contract between the Petitioners and Respondents above and beyond the scope of the order. That document states that the Petitioners had numerous rights that go far beyond the scope of the order. Among the rights on that list is ... confidentiality of the Petitioners records

Page 14

... it was a violation of the law of the State of West Virginia for an unlicensed and unsupervised psychologist to undertake such behavior. In fact, for that very conduct, Dr. Krolczyk was found to violate W.Va. Code § 30-21-3 by the West Virginia Board of Examiners of Psychologists.

Page 18

Dr. Krolczyk, whom was fully aware of the requirement of licensure under the law, knew or should have known that holding himself out to the public as a psychologist, not to mention testifying in court as a psychologist, could potentially cause damage to individuals and citizens, such as the Petitioners. ... West Virginia Code § 55-7-9 states: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages. ... This Court has expanded on that statute and stated found that when a statute imposes a duty on a person for the protection of others it is a public safety statute and a violation of such a statute is prima facie evidence of negligence unless the statute says otherwise.

**Valley Healthcare System Client Rights - Authorization for Treatment**

As a client of Valley HealthCare System you have the right to:

- Treatment and services under conditions that support your personal liberty and restrict that liberty only as necessary to comply with treatment needs. ...
- Refuse treatment ...
- Confidentiality of records. ...
- Exercise civil rights. ...
- Be informed, in appropriate language and terms, orally or written, the rights described on this page.